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No. _____

In The

Supreme Court of the United States

October Term, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, et al.,

Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Under Section 8 of the Reclamation Act (43 U.S.C. § 383), the operation of a federal project is subject to state law unless the state law is inconsistent with congressional directives. The question presented is:

Whether application of California law to the federal Central Valley Project ("CVP") conflicts with congressional directives when the state law requires the owner of a dam to pass water through the dam for downstream fishery purposes and Congress has explicitly prohibited the downstream release of water from the same dam pending a further act of Congress?

2. Section 7(a)(2) of the Endangered Species Act ("ESA") (16 U.S.C. § 1536(a)(2)) requires federal agencies to consult with the Secretaries of Interior and Commerce to ensure that any action carried out by the agency is not likely to jeopardize the continued existence of any threatened or endangered species. The questions presented are:

a. Whether the consultation requirement is satisfied when the Bureau of Reclamation requests consultation and the Secretary of Commerce refuses to consult?

b. Whether the completion of consultation and a finding of no jeopardy by the Secretary of Interior moots claims of a procedural violation of the ESA arising from a failure to complete consultation prior to commencement of the agency action?

PARTIES

A. Plaintiffs and Respondents:

Natural Resources Defense Council; Trout Unlimited of California; Bay Institute of San Francisco; California Natural Resources Federation; California Sports Fishing Protection Alliance; California Trout; Friends of the River; Northern California Guides Association; Pacific Coast Federation of Fisherman's Associations; San Joaquin Raptor Rescue Center; Sierra Club; Stanislaus Audubon Society, Inc.; United Anglers of California; California Striped Bass Association; and National Audubon Society.

B. Federal Defendants:[1]

Roger Patterson, as Regional Director of the Mid-Pacific Region of the United States Bureau of Reclamation; and Bruce Babbitt, as Secretary of the United States Department of the Interior.

C. Non-Federal Defendants and Petitioners:

Friant Water Users Authority; Orange Cove Irrigation District; Lindmore Irrigation District; Terra Bella Irrigation District; Exeter Irrigation District; Ivanhoe Irrigation District; Lower Tule River Irrigation District; Sausalito Irrigation District; Delano-Earlimart Irrigation District; Teapot Dome Irrigation District; Arvin-Edison Water Storage District; Southern San Joaquin Municipal Utility District; Shafter-Wasco Irrigation District; Porterville Irrigation District; Stone Corral Irrigation District; Chowchilla Water District; Madera Irrigation District; Lindsay-Strathmore Irrigation District; and Tulare Irrigation District.

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[1] Have chosen not to appeal the Ninth Circuit decision.

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The decision of the United States Court of Appeals for the Ninth Circuit is reported at 146 F.3d 1118. One of several orders of the United States District Court is reported at 791 F. Supp. 1425.

JURISDICTION

The decision of the United States Court of Appeals for the Ninth Circuit was filed and entered on June 24, 1998. A Petition for Rehearing was filed on August 6, 1998, and was denied on September 8, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(a).

APPLICABLE LAWS

The following are the laws applicable to this Petition:

1. Section 8 of the Reclamation Act of 1902 (43 U.S.C. § 383):

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any

way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

2. Central Valley Project Improvement Act Pub. L. No. 102-575, 106 Stat. 4706, § 3401(c)(1):

> During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

3. Section 7(a)(2) of the Endangered Species Act (16 U.S.C. § 1536(a)(2)):

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . .

4. Section 7(d) of the Endangered Species Act (16 U.S.C. § 1536(d)):

> After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable

commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

STATEMENT OF THE CASE

This case is appropriate for the granting of certiorari because it raises three issues of national significance. The first involves the exercise by Congress of the power to preclude the application of state law to facilities by clear statutory directive. The second is the scope of the consultation obligation imposed by the Endangered Species Act ("ESA") and the third is whether implementation of that consultation requirement and a no jeopardy finding moot a procedural violation of consultation requirements.

In 1992, Congress exercised its power through the Central Valley Project Improvement Act ("CVPIA"), Pub. L. No. 102-575, 106 Stat. 4706, to preclude the application of a state law requiring the downstream release of water from dams to a key facility of the Central Valley Project ("CVP"), the nation's largest water supply project. In doing so, Congress acted compatibly with a long-standing statutory program and federal plan which recognized that the CVP would fail to serve its intended purpose if downstream releases from the facility were compelled without careful federal control.

Commencing in the mid-1930's, Congress authorized construction of the CVP for the purpose of supplying

water to several million acres of fertile land in California's Central Valley. Included among the CVP facilities was the Friant Unit, consisting of Friant Dam and Millerton Reservoir on the San Joaquin River as well as the Friant-Kern and Madera canals. The Friant Unit provides much needed irrigation water to approximately a million acres of highly productive farms located along the eastern side of the San Joaquin Valley in Merced, Madera, Fresno, Tulare and Kern Counties (the "Friant Service Area").

As recognized by several earlier decisions of this Court, the Friant Unit was authorized by Congress with the understanding that it would impound virtually the entire flow of the San Joaquin River at Friant Dam and that refreshing the semiarid land in the Friant Service Area would come with a cost: except for occasional spills, a dry riverbed would exist below the dam. (*United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 729-730 (1950).) Indeed, as this Court recognized some 10 years after Friant operations commenced, the impairment of San Joaquin River flows at Friant was "most substantial – almost three-fourths of the material flow of the river." (*Dugan v. Rank*, 372 U.S. 609, 620-621 (1963).) To increase downstream flows, however, "would force the abandonment of the project which has not only been fully authorized by Congress but paid for through its continuing appropriations." (*Id.*) It would cause the Government to be "stopped in its tracks." (*Id.*)

The water made available by the Friant Unit was provided to farmers in the Friant Service Area by means of 40-year contracts entered into pursuant to Section 9(e) of the Reclamation Act of 1939. (43 U.S.C. § 485h(e).) In

1956, Congress amended the reclamation law to add a right of renewal of Section 9(e) contracts (43 U.S.C. § 485h-1) and each of the Friant water service contracts was subsequently amended to incorporate such a right.

In June 1988, the Government began formal negotiations with Friant Unit Water Service Contractors ("Contractors") for the purpose of renewing the long-term contracts for water service. On November 2, 1988, the Bureau of Reclamation ("Bureau") announced the completion of negotiations with the Orange Cove Irrigation District ("Orange Cove"), whose contract was the first to expire. Less than two months later, a consortium of environmental organizations commenced the present action against the Government and the Friant Water Users Authority seeking to invalidate the Orange Cove contract and other water service renewal contracts. Contractors then intervened.

Several years after the filing of their initial complaint, the environmental plaintiffs were granted leave to amend to assert that operation of the Friant Unit in accordance with a California law, relating to the downstream release of water from dams for fishery purposes, is required by Section 8 of the Reclamation Act of 1902. (43 U.S.C. § 383.) The claim was met with motions to dismiss raised by both the Government and the Friant water users. Each argued that Section 8 of the 1902 Act does not mandate compliance with state law. However, the district court ruled that application of the California law was not preempted. (*Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425 (E.D. Cal. 1992).)

Six months later, Congress enacted the CVPIA "to address impacts of the Central Valley Project on fish, wildlife and associated habitats" and "to protect, restore and enhance fish, wildlife and associated habitats in the Central Valley . . . of California." (CVPIA, § 3402(b), 106 Stat. 4706.) In doing so, Congress directed the Secretary of Interior to develop a "reasonable, prudent and feasible" comprehensive plan that would address fish, wildlife and habitat concerns on the San Joaquin River, "including but not limited to streamflow." (CVPIA, § 3406(c), 106 Stat. 4721.) Moreover, Congress directly addressed the issue of reservoir releases from Friant Dam prior to the implementation of such a federal plan: "[U]ntil such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make releases as a measure to implement this title without a specific Act of Congress authorizing such releases." (*Id.*)

Following enactment of the CVPIA, renewed motions to dismiss were brought by the Government and the Friant water users. Each argued that the CVPIA preempted plaintiffs' claim that state law could be applied to compel the release of water from Friant Dam. By order issued October 12, 1993, however, the district court denied the motions. (App. 38.) While the court concluded that an order mandating compliance with California's Fish and Game Code might contravene the methodical approach to San Joaquin River restoration laid out by Congress, it determined that the restriction on flow

releases set forth in Section 3406(c) of the CVPIA applies *only* to releases of water that might otherwise be required by the CVPIA itself. (App. 72.) Accordingly, the district court found no impediment to plaintiffs' attempt to compel downstream releases from Friant Dam by means of state law. On appeal, the Ninth Circuit affirmed, holding that despite the language of Section 3406(c), there is no clear directive in the CVPIA that preempts application of the state law if it can be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below Friant dam in a manner that is "reasonable, prudent and feasible." (App. 34.)

The second issue of significance raised by the present case concerns the scope of the consultation obligation imposed by Section 7 of the ESA. More specifically, it raises the issue of the obligations imposed on a federal action agency when the relevant wildlife agency *refuses* to consult under the ESA. Also involved is the question whether the *action* agency (the Bureau in this case) can be charged with arbitrary and capricious conduct if the wildlife agency declines to consult for the wrong reason.

Section 7(a)(2) of the ESA imposes a substantive duty on federal agencies to "insure that any action authorized, funded or carried out by such agency is not likely to jeopardize the continued existence of any endangered or threatened species. . . . " Section 7(a)(2) also provides that the federal action agency shall discharge this substantive duty to avoid jeopardy "in consultation with and with the assistance of [the appropriate federal wildlife agency.]"[1]

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[1] A Section 7 consultation regarding listed land-based species is within the jurisdiction of the Fish and Wildlife Service

In August 1989, NMFS listed the Sacramento River winter-run salmon as a threatened species under the emergency provisions of the ESA. On November 20, 1990, the Bureau, by letter, asked NMFS to concur in its determination that Friant contract renewals would not adversely affect the winter-run salmon. On February 26, 1991, NMFS asked the Bureau to enter into formal Section 7 consultation regarding the effects of the Bureau's *overall* operation of the CVP on the winter-run salmon. On April 11, 1991, the Bureau agreed to a formal consultation on the overall operation of the CVP. (App. 12, 215.)

After the Bureau agreed to consult with NMFS about *overall* CVP operations, NMFS responded to the Bureau's earlier November 20, 1990 letter which had stated the Bureau's view that renewal of the Friant contracts would not adversely affect the salmon. NMFS' November 1, 1991 letter replied that "[w]hile we disagree with the Bureau's determination that renewal of the Friant contracts are not likely to affect winter-run [salmon] adversely, for the reasons discussed below, *we do not believe a formal consultation on the Friant contract renewals is necessary.*" (App. 229, emphasis added.)

Nonetheless, NMFS' letter went on to state: "However, the issue of delta exports *is being addressed in our ongoing consultation on the CVP* . . . and we believe *this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts.*" (App. 230.) NMFS' letter also commented on provisions that the

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("FWS"); consultation regarding listed marine species is within the jurisdiction of the National Marine Fisheries Service ("NMFS").

Bureau had added to the renewed Friant contracts which allowed for modification based on future ESA requirements. It then summarized NMFS' conclusion why no formal consultation over the winter-run salmon was required for Friant contract renewal: "Given that the issue of Delta exports is being addressed in ongoing consultations [on overall CVP operations] and that the Bureau is conditioning renewed Friant contracts so they may be modified to compensate for changes in delta exports if needed, *we see no need to consult on Friant contract renewals at this time.*" (App. 231.)

On February 14, 1992, NMFS issued its biological opinion on the winter-run salmon pursuant to its consultation with the Bureau on overall CVP operations. (App. 215.) The biological opinion covered the 1992 operation of all CVP units, except the Friant Unit: "NMFS and the Bureau agreed that the scope of this consultation would include operations of all CVP units, except the Friant Unit. Operations of the Friant Unit do not directly affect winter-run salmon, and the indirect impacts of Friant operations are addressed in the discussion of the Delta Division operations." (App. 216.) While the 1992 salmon biological opinion concluded that CVP operations would jeopardize the salmon, the opinion included a reasonable and prudent alternative ("RPA") that, in NMFS' opinion, would avoid jeopardy to the salmon. Significantly, neither this RPA nor any other provisions of the biological opinion called for any changes in Friant operations or the Friant renewal contracts. (App. 219-228.)

Plaintiffs sued the Bureau contending that its renewal of the Friant water supply contracts violated the procedural requirements of Section 7 of the ESA. In a 1995

order, the district court agreed, holding that the Bureau's failure to pursue formal consultation with NMFS over Friant contract renewals was an independent procedural violation of Section 7 which invalidated all of the Friant contracts. (App. 130.) Even though NMFS had *declined* to consult with the Bureau over Friant contract renewals, the court concluded that NMFS' reasons for not consulting "were not rationally related to [the Bureau's] obligations under ESA," (App. 130) and had no bearing on the Bureau's "independent affirmative duty" to ensure that contract renewal did not jeopardize species. (App. 129.) On appeal, the Ninth Circuit affirmed. It held that the Bureau had acted arbitrarily and capriciously in relying upon NMFS' refusal to consult since, "[t]he reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligation to ensure that its proposed actions were not likely adversely to affect the salmon." (App. 20.) In short, the Ninth Circuit concluded the Bureau acted arbitrarily and capriciously in *relying* upon the advice of the federal agency charged with implementation of the ESA. Neither the district court nor the Ninth Circuit explained how the Bureau was expected to pursue consultation in the face of a refusal by NMFS to consult.

The third issue of national significance raised by the present petition involves a split among the circuits regarding the issue of whether the *completion* of a Section 7 consultation and a finding of no jeopardy by the Secretary of Interior will moot a claim of procedural violation of the consultation requirements of the ESA. On April 18, 1988, before renewing any of the Friant contracts, the

Bureau also asked the FWS for a list of land-based species that might be present in the area affected by the Friant renewal contracts. (App. 232.) Thereafter, as the district court found, extensive informal consultation occurred between the Bureau and FWS. (App. 113-114.)

On April 29, 1991, the Bureau *issued* a draft biological assessment for Friant contract renewals, which was supplemented on June 14, 1991. On May 22, 1991, the Bureau asked FWS to formally consult on the issue of contract renewal. (App. 114.) Thereafter, on October 15, 1991, the FWS issued its biological opinion which concluded that renewal of the Friant contracts would not jeopardize any listed land-based species. (App. 114.) By the date of FWS' "no jeopardy" biological opinion, the Bureau had renewed 10 of the 28 Friant Unit water supply contracts. (App. 114.)

In its 1995 order, the district court concluded that FWS' later issuance of a "no jeopardy" opinion in 1991 did *not* moot plaintiffs' claims of a procedural violation of Section 7 of the ESA. (App. 122.) On appeal, the Ninth Circuit concurred, holding that the *process* of consultation protects against the risk of a substantive ESA violation and ensures that environmental concerns will be factored into the ESA decision making process as instructed by Congress. (App. 24.) Notably, neither the district court nor the Ninth Circuit explained *why* plaintiffs in the present case could not simply have sued the Secretary of the Interior if they believed his biological opinion regarding Friant contract renewal was substantively defective. (*See Bennett v. Spear*, 520 U.S. 154 (1997).) The Ninth Circuit's decision is in conflict with the opinion of the Tenth Circuit in *Southern Utah Wilderness Alliance v. Smith*,

110 F.3d 724 (10th Cir. 1997) and the opinion of the Fifth Circuit in *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998), both of which hold that the subsequent completion of consultation under Section 7 of the ESA *moots* claims of a procedural violation of the consultation requirements of the Act.

ARGUMENT

1. The CVPIA Conflicts with and Preempts State Law Relating to the Release of Water from Friant Dam

The Court of Appeals erred in holding that the application of California Fish and Game Code Section 5937 to the operation of Friant Dam is not preempted by federal law. Section 8 of the Reclamation Act of 1902 requires compliance with state law relating to water, *unless* the state law conflicts with congressional directives: "A State limitation or condition on the federal management or control of a federally financed water project is valid *unless* it clashes with express or clearly implied congressional intent or works at cross-purposes with an important federal interest served by the congressional scheme." (*United States v. State of California Water Resources Control Board*, 694 F.2d 1171 (9th Cir. 1982), emphasis added.) More recently as this Court has written: "A state law is also preempted if it interferes with the methods by which the federal statute was designed to reach [its] goal." (*International Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987).) The provisions of the CVPIA relating to the release of water from Friant Dam create such a conflict with Fish and Game Code Section 5937 and therefore

preempt its application. Furthermore, application of Section 5937 to Friant Dam would work at cross-purposes with the federal interest in its largest water project and would be contrary to the congressional scheme for management of that project.

This case involves two long continued threads of water law. The first is the general rule, as interpreted by this Court in *California v. United States*, 438 U.S. 645 (1978), that through the federal-state relationship regarding water usage "runs the consistent thread of purposeful and continued deference to State water law by Congress." (*Id.* at 653.) In that decision, the Court wrote that because of this deference to state water law, a state can impose limits on water usage from a federal reclamation project to the extent that such conditions are not "inconsistent with congressional provisions authorizing the project in question." (*Id.* at 674.)

The second thread, as evidenced by this Court's earlier decisions, the language and legislative history of the Friant Unit, and the CVPIA, is of *not* requiring – or even allowing – fishery releases from Friant Dam. The conflict between these two federal policies is resolved by the CVPIA, comprehensive legislation adopted by Congress in 1992, which preempts the application of Section 5937 to Friant Dam. The Ninth Circuit's opinion ignores this congressional resolution, eviscerates the distinction articulated in *California v. United States* and creates a precedent where Congress can virtually *never* preempt state water law.

(a) The Language of the CVPIA Expresses Congress' Intent to Preclude the Release of Water From Friant Dam

The Ninth Circuit's decision ignores the broad statutory purposes of the CVPIA set forth in Section 3402 of the Act (106 Stat. 4706):

> (a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley . . . of California;
>
> (b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;
>
> . . .
>
> (f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

Given the breadth of these purposes, it is evident that Congress' intent was to set forth a statutory framework that would integrate the operation of the CVP with the needs of the environment. This framework distinguishes the operation of Friant Dam from the rest of the CVP, and provides a separate program "to address fish, wildlife and habitat concerns" on the San Joaquin River between Friant Dam and the Mendota Pool (where Sacramento River water pumped from the Sacramento-San Joaquin Delta is discharged to replace San Joaquin River water diverted at Friant). (*See Dugan v. Rank*, 372 U.S. 609, 612-13 (1963).)

In Section 3406(b) of the CVPIA, Congress laid out a *comprehensive* fish and wildlife restoration program intended to achieve the broad protective purposes of the Act set forth in Sections 3402(a), (b), and (f). Congress described some 23 separate fish and wildlife restoration activities including: a program to double the number of anadromous fish in Central Valley streams by the year 2002 (§ 3406(b)(1)); the dedication of 800,000 acre-feet of water to fish and wildlife purposes (§ 3406(b)(2)); and programs to mitigate fishery impacts at the CVP's Tracy and Contra Costa Canal pumping plants (§ 3406(b)(14), (15)) and (§ 3406(b)(5)). All of these measures are subject to the requirement that they shall: " . . . meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act . . . , and all decisions of the California State Water Resources Control Board . . . . " (§ 3406(b).)

However, when it came to achieving the broad fish, wildlife and habitat restoration purposes of the Act by means of flow releases from Friant Dam, Congress made an exception. Thus, for example, when Congress mandated a doubling in the natural production of anadromous fish for the CVP (§ 3406(b)(1)), it also carved out an exception which made the requirement inapplicable to the San Joaquin River between Friant Dam and the Mendota Pool.[2] In providing for such an exception, Congress

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[2] The exception to the anadromous fish doubling goal states:

> "Provided, that this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, *for which a separate program is authorized under*

removed Friant Dam from a series of measures requiring the Secretary of the Interior to "modify Central Valley Project operations" to provide flow releases for anadromous fish. (*See* §§ 3406(b)(1)(A) and (B).)

Congress' determination to treat the San Joaquin River below Friant Dam differently than other streams was expressed even more clearly in Section 3406(c) of the Act. There, Congress sought to achieve the CVPIA's broad purposes by: (1) directing the Secretary to develop a reasonable, prudent and feasible "comprehensive plan" that would address "fish, wildlife, and habitat concerns on the San Joaquin River," including streamflow; (2) barring the Secretary from making releases for the restoration of flows as a measure to implement the CVPIA absent a further Act of Congress; and (3) establishing a system of monetary surcharges in lieu of flow releases, with the surcharge to be paid to a fishery Restoration Fund (§ 3407). Notably, Section 3406(c) contains no mandate such as that found in Section 3406(b) (which is applicable to other portions of the CVP) regarding compliance with state law. Instead, Section 3406(c) *prohibits* the release of water from Friant Dam absent a further act of Congress. This prohibition is completely consistent with the long-standing expressions of congressional intent regarding operation of the Friant Unit.

If Congress *had* intended for Section 5937 to apply to the operation of Friant Dam it could have easily done so by simply adding Section 3406(c) to the list of restoration

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subsection 3406(c) of this title." (§ 3406(b)(1), emphasis added.)

activities described in subsection (b), or by moving the "compliance with State law" provisions of subsection (b) to the beginning of Section 3406 so that it would be applicable to *all* of subsection 3406 including subsection (c) relating to the San Joaquin River. It did neither of these things, and the Ninth Circuit's editorial comments on how Congress should have written Section 3406(b) if it wanted to preempt state law completely ignore this distinction. (App. 33.)

The Ninth Circuit's conclusion hinges on its narrow reading of the language "as a measure to implement this title," which is used in Section 3406(c)(1). In focusing solely on the language of the CVPIA, the Ninth Circuit failed to apply this Court's preemption test: "To discern Congress' intent we examine the explicit statutory language *and* the structure and purpose of the statute." (*Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990), emphasis added.) Indeed, the primary difficulty with that narrow reading is that it ignores the very *broad* nature of the CVPIA. The purposes of "this title," set forth in Section 3402 of the Act, are "to protect restore and enhance fish and wildlife and their associated habitats in the Central Valley;" "to address impacts of the CVP on fish;" and "to achieve a reasonable balance among competing demands for use of CVP water." (§§ 3402(a), (b), and (f).) Moreover in Section 3406(c) Congress acted to address "fish, wildlife and habitat concerns" on the lower San Joaquin. Congress used the CVPIA to provide a framework for comprehensive environmental protection by the CVP including protection on the San Joaquin River

below Friant Dam. Reading the phrase "this title" narrowly is improper and is inconsistent with this broad purpose.

Second, Congress did not repeal *any* of the Government's ESA obligations on the San Joaquin River. Rather, it decided that any fishery obligations of the Friant project will be met through the development of a reasonable, prudent and feasible "comprehensive plan" and through the collection and disbursement of a monetary surcharge to be imposed on the Friant water users and deposited in the "Restoration Fund" established by the CVPIA. (§ 3406(c)(1).) Under the terms of Section 3407, monies in the Restoration Fund are to be used to carry-out the fishery restoration activities mandated by the CVPIA in cooperation with the Department of Fish and Game.[3]

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[3] Another anomaly of the Ninth Circuit's reasoning is that to be consistent it implicitly acknowledges that the CVPIA *does* preempt another provision of California law. California Water Code Section 11226 provides:

> Friant Dam shall be constructed and used *primarily* for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use, and *secondarily* for the generation of electric power *and other beneficial uses*. (Emphasis added.)

This statutory provision prioritizes irrigation and domestic use above "other" beneficial uses of Friant Dam such as environmental uses. Unless the CVPIA preempts this provision of California law, irrigation and domestic use would continue to have a priority over environmental uses under State law.

(b) The Legislative History of the CVPIA Confirms Congress' Preemptive Intent Regarding Section 5937

The legislative history of the CVPIA, which is ignored by the Ninth Circuit, strongly supports an interpretation that Congress intended the Act to preempt state law relating to the release of water from Friant Dam. An early version of the CVPIA specifically required compliance with Section 5937. (App. 244.) This requirement was omitted in the final version of the CVPIA.

Courts do consider and give weight to the "disappearance" of proposed language in later versions or amendments of a bill where an express or implied explanation of the reasons for the change can be found in, or derived from, the legislative history. (*See United States v. St. Paul, M. & M. R. Co.*, 247 U.S. 310, 318-19 (1918).) Indeed, this Court has held that "where Congress includes limiting language in an earlier version of a bill but deletes it prior to enactment, it may be presumed that the limitation was not intended." (*Russello v. U.S.*, 464 U.S. 16, 23-24 (1983) citing *Arizona v. California*, 373 U.S. 546, 580-81 (1963).) Further, in *John Hancock Mutual Life Insurance Company v. Harris Trust & Sav. Bank*, 510 U.S. 101, 101 n.12 (1993), the Court made clear that while it was "directed by" the words of a bill finally enacted, Congress' failure to pass a proposed provision "counsels against" reading a different provision to imply what was excluded by the unenacted provision. The Ninth Circuit's ruling is inconsistent with these decisions.

In sum, the CVPIA is simply the latest congressional statement regarding the operation of Friant Dam in a continuum which stretches back to the 1930's and beyond. At no point in this continuum has Congress *ever* directed that Friant Dam should be operated to restore fisheries between the Dam and Mendota Pool. To the contrary, it was recognized by Congress, and this Court, that an effort to do so would impair the congressionally intended purpose of Friant Dam and would not be in the public interest. Section 3406(c) of the CVPIA is simply the most recent expression of this long-continued congressional thread.

2. This Court Should Grant Review to Resolve a Conflict Among the Circuits on Mootness and Subsequent Compliance with ESA Requirements

The Ninth Circuit concludes that procedural violations of the ESA are not necessarily mooted through subsequent procedural compliance. It made this ruling despite the fact that: (1) FWS issued a no jeopardy biological opinion; and (2) NMFS issued a winter-run salmon biological opinion which found that no changes in Friant operations were needed for RPAs that would avoid jeopardy to the salmon. Ignoring the decisions of the two federal agencies charged with primary responsibility under the ESA, the Ninth Circuit nonetheless concluded that, regardless of substantive issues or results, the *process* of consultation in and of itself is essential.[4]

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[4] The Ninth Circuit concluded that *Southern Utah Wilderness Alliance* is distinguishable because it involved a

The Ninth Circuit also speculates, without support, that the Friant contracts might have been modified if the biological opinion had been rendered before the contracts were executed. This reasoning squarely conflicts with *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724 (10th Cir. 1997) and *Sierra Club v. Glickman*, 156 F.3d 606 (5th Cir. 1998).

The Tenth Circuit's holding in *Southern Utah Wilderness Alliance* is materially indistinguishable from this case. There plaintiff contended that consultation should have occurred prior to, rather than after, agency action. The Tenth Circuit held that since consultation had subsequently been completed, plaintiff's action seeking consultation was moot:

> Indeed, SUWA does not explain how an injunction ordering another round of consultation would provide any meaningful relief. SUWA does not show any reasonable likelihood that such an order would result in any changes to the Schedule, or that either the BLM or the FWS would change its position on the Schedule. (110 F.3d at 728.)

Thus, *Southern Utah Wilderness Alliance* holds that a procedural claim of improper agency action before completion of a Section 7 consultation is rendered moot, as a matter of Article III jurisdiction, once the consultation is

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history of consultation between the action agency and the FWS. The Ninth Circuit ignores the district court's finding that there was "extensive informal consultation" between the FWS and the Bureau throughout 1990 and 1991. (App. 113-114.)

subsequently completed. (*Id.* at 727-729.)[5] Thus, while the Ninth Circuit concluded that subsequent procedural compliance cannot moot a procedural violation of Section 7, the Tenth Circuit in *Southern Utah* held that it can and that a court lacks Article III jurisdiction to entertain such a moot claim.

The Fifth Circuit's decision in the recent case of *Sierra Club v. Glickman, supra,* is also in conflict with the Ninth Circuit's holding in this case. In *Glickman,* the Sierra Club filed a motion to dismiss the United States Department of Agriculture's ("USDA") appeal on the grounds that it was moot. The Sierra Club had claimed the USDA had breached its Section 7 duties by making certain contract payments to farmers prior to engaging in formal consultation. Subsequently, the USDA completed its consultation obligations. The Fifth Circuit held that because there had been subsequent compliance with the consultation requirement of Section 7 the issue was moot. (156 F.3d at 619.) *Glickman* and the present case are indistinguishable. In both, the federal action agencies remedied any noncompliance by completing their consultation requirements, yet the Fifth and Ninth Circuits reach opposite results.

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[5] *Southern Utah* also recognizes the futility of "ordering another round of consultation" where the plaintiff has utterly failed to show that such an order would result in any changes of position by FWS. (110 F.3d at 728.) Similarly, in the case at bench, it is unclear how "another round of consultation" will result in any change of position by FWS or NMFS when the wildlife agencies have *already* decided that contract renewal causes no jeopardy and need not be modified for RPAs that avoid jeopardy.

3. The Ninth Circuit Erred in Ruling That the Bureau Violated its ESA Obligations by Accepting NMFS' Refusal to Consult

In the present case, the Bureau determined that Friant contract renewals were too remote to adversely affect the Sacramento River winter-run salmon. It asked NMFS to concur in that conclusion in 1990, shortly after the winter-run salmon was formally listed as a "threatened" species. NMFS did not agree with the Bureau's determination that the Friant contract renewals were too remote to adversely affect the salmon. However, NMFS *declined* to consult with the Bureau over impacts to the salmon in a consultation over Friant contract renewals. (App. 229.) Instead, NMFS told the Bureau that it would consult on salmon impacts in the formal consultation which NMFS had already initiated with the Bureau on overall CVP operations.

The Ninth Circuit court reviewed these facts and concluded that: " . . . the Bureau was arbitrary and capricious when it relied on the NMFS' view that a consultation was not necessary, despite NMFS' refusal to provide the required concurrence. By relying on the NMFS in this case, the Bureau did not meet its independent responsibilities under the ESA." (App. 20.)

The Ninth Circuit's decision is nonsensical in this regard. Who was the Bureau supposed to consult with about Friant contract renewals if NMFS – the wildlife agency with jurisdiction over the winter-run salmon – refused to consult? Should the Bureau have sued its sister agency, NMFS, to force it to consult? Or was it more reasonable to conclude that the Bureau's obligation to

pursue a consultation about Friant contract renewal ended when NMFS refused to consult?

To compound the problem, the Ninth Circuit apparently failed to understand that NMFS' refusal to consult did not mean there would be *no* consultation about CVP impacts on the winter-run salmon. Instead, what was at issue was simply *where* the consultation would occur. NMFS declined to consult about Friant contract renewal because it decided that it made more sense to consider the impact of Friant *operations* on the salmon as part of an already initiated consultation involving overall CVP operation. This was an eminently reasonable decision.

The Ninth Circuit concluded that the Bureau failed to discharge its "independent responsibilities" to avoid jeopardizing the salmon. (App. 20.) In so doing, it missed the point of NMFS' decision and the Bureau's response to it. Because NMFS believed that Friant operations affect Delta exports, and because Delta exports adversely affect the salmon, any sensible consultation over the salmon should include Delta exports. In short, NMFS' preference to consult with the Bureau in an *overall* CVP consultation rather than in one limited to Friant contract renewal made practical and scientific sense. In a highly technical consultation over the operation of the largest reclamation project in the nation, the Ninth Circuit should have deferred to NMFS' judgment, as the Bureau did, as to how best to structure and organize the consultation.

4. The Ninth Circuit Erred in Concluding the Bureau's Consultation with FWS was Untimely

The Ninth Circuit ruled that the Bureau violated Section 7(d) of the ESA by executing the Friant contracts prior to the completion of a biological opinion. (App. 23.) This interpretation of Section 7 is erroneous for several reasons. First, the Ninth Circuit wrongly assumes that Section 7(d) is an *authorization* of agency action that otherwise would be prohibited. It read Section 7 as a general prohibition against any agency action before completion of a biological opinion, and then interpreted Section 7(d) to carve out an exemption to the general prohibition, allowing certain types of "non-irreversible" actions which can go forward after, but not before, formal consultation is initiated. This turns Section 7(d) on its head.

Section 7(d) is not an authorization but a prohibition. The heading of Section 7(d) describes it as a "Limitation on commitment of resources."[6] Indeed, Section 7(d) is properly interpreted as a prohibition or limitation on the types of agency action that can occur *after* consultation begins. The Ninth Circuit essentially inverted the function and role of Section 7(d) in the statutory scheme by presuming that Section 7(d) is a narrow authorization enacted against the backdrop of a general prohibition

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[6] Section 7(a)(4) of the ESA, 16 U.S.C. Section 1536(a)(4), also refers to the "*limitation* on the commitment of resources as described in *subsection (3)* of this section." (Emphasis added.) The Ninth Circuit in *Sierra Club v. Marsh*, 816 F.2d 1376, 1389 (9th Cir. 1987) also described Section 7(d) as a "statutory prohibition." (*See also* 50 C.F.R. § 402.09 (referring to Section 7(d) limitations on irreversible commitments as a "prohibition" in force during the consultation process).)

against agency action prior to the initiation of consultation. The more natural reading of the statute is that Section 7(d) is a limitation that applies *after* formal consultation begins, and that it imposes restrictions on agency action that do not exist before the initiation of consultation.

"Consultation" for purposes of Section 7(d) should not be limited to formal consultation. Before an agency makes a request for formal consultation pursuant to 50 C.F.R. Section 402.14(c), it is still engaged in "consultation" under Section 7. For example, under 50 C.F.R. Section 402.12(c) of the Section 7 regulations, consultation begins when an agency requests a list of species that may be present in the proposed action area. This is so because 50 C.F.R. Section 402.12(d)(1) provides that if the wildlife agency responds to this request by stating that no species are present in the proposed action area, *"further consultation* is not required." (Emphasis added.) "Further consultation" means that consultation must have begun as a result of the initial request for a list of species.[7] (*See also Bay's Legal Fund v. Browner*, 828 F. Supp. 102, 106 (D. Mass. 1993) (noting that EPA *"initiated this consultation* with the NMFS *requesting information concerning the presence of endangered species* in the proposed project area"). Emphasis added.) In *Bay's Legal Fund*, the federal agency: (1) began Section 7 consultation in 1986 by requesting a

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[7] The regulations distinguish between actions that trigger the "initiation" of consultation, *see* Section 402.14(c) and the "termination" of consultation (*see* Section 402.14(l)), so the reference to "further consultation" in Section 402.12(d)(l) is not haphazard or unintentional.

list of species in the project area (*id.*); (2) completed the functional equivalent of a biological assessment in 1988 (*id.* at 106, 110, and 111 n.20); (3) let contracts for construction and began construction in 1990 (*id.* at 106); (4) first requested formal consultation with the wildlife agency in 1993 (*id.* at 107); and (5) as of the date of the opinion (1993), still had not received a biological opinion on the project (*id.* at 107, 111). The district court in *Bay's Legal Fund, supra,* permitted the construction activities to proceed, and rejected the plaintiffs' ESA procedural claims even though construction had begun before formal consultation had been initiated.

In this case, the Bureau requested a list of species present in the action area on April 13, 1988. (App. 232.) Consequently, because Section 7(d) refers only to the initiation of "consultation" and because the regulations provide that consultation begins on the date a species list is requested, consultation in this case, for purposes of Section 7(d), began on April 13, 1988, not May 22, 1991, as the Ninth Circuit concluded. (App. 21.)

5. The Ninth Circuit Erred in Ruling That Rescission of the Friant Renewal Contracts was the Sole Available Remedy

The Ninth Circuit's decision ignores this Court's rulings in *TVA v. Hill,* 437 U.S. 153 (1978); *Weinberger v. Romero-Barcello,* 456 U.S. 305 (1982); and *Amoco Production v. Village of Gamble,* 480 U.S. 531 (1987). Contrary to the Supreme Court's findings in each of those cases, the Ninth Circuit focused on the *process* of consultation and inexplicably ignored the substantive issue of its ability to

preserve the contracts and resolve the procedural flaw. In *Romero-Barcello,* this Court concluded that the *purpose* of the Clean Water Act: "would not be undermined by allowing the statutory violation to continue during the permit application process because the . . . [discharge] was not polluting the water. (456 U.S. at 314-315.) The First Circuit had erroneously focused on the integrity of the permit process rather than on the integrity of the Nation's waters." (480 U.S. at 542-543.)

Amoco Production reached the same conclusion: "Like the First Circuit in *Romero-Barcello,* the Ninth Circuit erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect – preservation of subsistence resources." (480 U.S. 544.) Both of those cases distinguished this Court's seminal ESA opinion in *TVA v. Hill, supra,* 457 U.S. 305. In *Hill* "only an injunction could vindicate the objectives of the Act [ESA]." (456 U.S. 314.)

Here, rescission of the contracts was not the only way the purposes of the ESA could be effectuated. Simply put, the Ninth Circuit's judgment in this case is the only decision on record which holds that the remedy for a procedural violation of the ESA must, *in all cases and under all circumstances,* ensure that a biological opinion issues *prior* to the agency action in question. If that were in fact the rule, then the remedy to be applied *automatically in all cases* in which a procedural ESA violation is found would be rescission of the lease, contract or other action agency authorization in question. *Amoco Production* and *Romero-Barcello* hold that is *not* the law.

The cases involving procedural violations of the ESA have consistently focused on whether or not the offending action will alter the physical status quo pending compliance with the ESA's procedural requirements. (*See, e.g., TVA v. Hill, supra,* 437 U.S. 153, 172; *Thomas v. Peterson, supra,* 753 F.2d 754; *Sierra Club v. Marsh,* 816 F.2d 1376 (9th Cir. 1987); *Pacific Rivers Council v. Thomas, supra,* 30 F.3d 1050, 1057.) Here, unlike *Hill,* execution of the long-term renewal contracts did not result in a change in the physical status quo. Indeed, the district court so concluded. (App. 104.) The contract renewal accomplishes nothing new, nor more extensive, nor other than that contemplated when the original Friant water service contracts were executed. In the circumstances of this case, rescinding the renewed water supply contracts of the Friant Intervenors thus does not serve the species protective purpose of the ESA. Accordingly, the Ninth Circuit's holding that the Bureau violated Section 7 procedurally, and that the proper remedy for such a violation was contract rescission, should be reversed.

Respectfully submitted,

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FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY, *Plaintiffs-Appellees,* v. DAVID G. HOUSTON, *Defendant,* and LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT, *Defendants-Intervenors-Appellants.*	No. 97-16030 D.C. No. CV 88-1658 LKK OPINION

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ORANGE COVE IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; EXETER IRRIGATION DISTRICT; IVANHOE IRRIGATION DISTRICT; LINDMORE IRRIGATION DISTRICT; LINDSAY-STRATHMORE IRRIGATION DISTRICT; TERRA BELLA IRRIGATION DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16041

D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

FRIANT WATER USERS AUTHORITY,

Defendant-Appellant.

No. 97-16042

D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

MADERA IRRIGATION DISTRICT; CHOWCHILLA WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16043

D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY, *Plaintiffs-Appellees,* v. DAVID G. HOUSTON, *Defendant,* and ARVIN-EDISON WATER STORAGE DISTRICT; SHAFTER-WASCO IRRIGATION DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT, *Defendants-Intervenors-Appellants.*	No. 97-16044 D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

TULARE IRRIGATION DISTRICT,

Defendant-Intervenor-Appellant.

No. 97-16045

D.C. No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellants,

v.

ROGER PATTERSON as Regional Director of the U.S. Bureau of Reclamation; BRUCE BABBITT; FRIANT WATER USERS AUTHORITY,

Defendants-Appellees,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUCELITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellees.

No. 97-16173

D.C. No.
CV 88-1658 LKK

Appeals from the United States District Court
for the Eastern District of California
Lawrence K. Karlton, District Judge, Presiding

Argued and Submitted
December 8, 1997 – San Francisco, California

Filed June 24, 1998

Before: Otto R. Skopil, Jr., Dorothy W. Nelson, and
A. Wallace Tashima, Circuit Judges.

Opinion by Judge Tashima

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OPINION

TASHIMA, Circuit Judge:

Various irrigation and water districts (Non-federal Defendants), that rely on water from the Friant dam, appeal the district court's summary judgment decision that the Bureau of Reclamation (Bureau or Federal Defendant), violated the Endangered Species Act (ESA) by renewing water contracts prior to completing required endangered species consultations. These defendants also appeal the district court's conclusion that Section 8 of the Reclamation Act, 43 U.S.C. § 383, mandates compliance with Section 5937 of the California Fish and Game Code. Various environmental groups led by the National Resources Defense Council (Plaintiffs), cross-appeal the district court's summary judgment decision that the

Bureau was not required to comply with National Environmental Policy Act (NEPA) and appeal the dismissal of the Section 8/Section 5937 claim as unripe.

We affirm the district court's holding that the ESA was violated and its decision to rescind the contracts at issue. We remand for a determination on the Section 8/Section 5937 claim.

BACKGROUND

The Central Valley Project (CVP) is a multi-unit reclamation project administered by the Bureau. The Friant dam unit of the CVP was built on the San Joaquin River by the Bureau in the 1940s. Prior to construction of the dam, the San Joaquin River met the Sacramento River at the Sacramento-San Joaquin Delta, where they then flowed out to the Pacific Ocean. Since the time that the dam was completed, the Friant unit has impounded the San Joaquin River water behind the Friant dam and diverted the water to surrounding irrigation districts. This impoundment and diversion leaves a dry stretch of San Joaquin riverbed.

In the late 1940s, the Non-federal Defendants[1] entered into 40-year Friant water service contracts with the government, pursuant to Section 9(e) of the Reclamation Act of 1939, 43 U.S.C. § 485h(e). The contracts typically provided that they would be renewed no later than one year prior to expiration on terms that "shall be

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[1] All of the Non-federal Defendants, except for the Friant Water Users Authority, have water service arrangements with the Bureau.

agreed upon." In 1956, Congress mandated that contract holders had a right to renewal "under stated terms and conditions mutually agreeable to the parties." 43 U.S.C. § 485h-1(1). Contract holders had "a first right . . . to a stated share or quantity of the project's available water supply. . . . " 43 U.S.C. § 485h-1(4).

The first of these contracts, the contract with the Orange Cove Irrigation District (Orange Cove), expired in February of 1989. The Bureau began contract renewal negotiations with Orange Cove in June, 1988, and executed a renewal contract in May, 1989. By 1992, the Bureau had executed 13 additional water contracts. All 14 contracts provided for water delivery for a 40-year period under terms substantially similar to those in the previous contracts.

In 1992, Congress enacted the Central Valley Project Improvement Act (CVPIA), Pub.L. No. 102-575, § 3401 et seq., 1992 U.S.C.C.A.N. (106 Stat.) 4600, 4706, which required the government to perform an environmental impact statement (EIS) on the Friant unit before it could execute the remaining renewal contracts. The CVPIA also limited the length of subsequently renewed contracts to 25 years. Therefore, of the 28 Friant water service contracts that were up for renewal, only the first 14 contracts are at issue.

Prior to construction of the Friant dam, the San Joaquin River supported a variety of fish species, including the chinook salmon. The annual spring floods also fed the surrounding wetlands with fresh water. After the Friant dam was built, the San Joaquin River terminated at the dam, and water from the Sacramento-San Joaquin Delta is

exported upstream to water users below the dam through a process of pumping and reverse flows. This situation has adversely affected both wetlands and river fish, including the winter-run chinook salmon. The salmon, which was listed as threatened in August, 1989, and is now endangered, is under the protective jurisdiction of the National Marine Fisheries Service (NMFS). Other listed species under the jurisdiction of the Fish and Wildlife Service (FWS) are also located in the Friant Service Area.

The Plaintiffs filed this action against the Bureau in December, 1988, claiming that the Bureau violated NEPA by renewing the water contracts without first performing an EIS. The Plaintiffs sought a preliminary injunction against further contracts. The district court denied the injunction, but ordered the parties to include in the remaining contracts a clause that conditioned the terms on the final outcome of this case. All the renewal contracts in this case, except for the Orange Cove contract, contain this provision. The contracts also include a clause, entitled "Compliance with Reclamation Laws," which permits minor modifications to the contracts in order to comply with federal law. This clause is known as Article 14.

The Plaintiffs' amended complaint also alleges violations of the ESA, section 8 of the Reclamation Act (§ 8), and section 5937 of the California Fish & Game Code (§ 5937). The Non-federal Defendants were permitted to intervene in 1989.

There are five district court orders that are now at issue:

(1) Order filed April 30, 1992. The district court denied the Defendants' motion to dismiss the § 8/§ 5937 claim. *See* 791 F.Supp. 1425 (E.D.Cal.1992).

(2) Order filed October 12, 1993. The district court denied the Defendants' motion to dismiss the § 8/§ 5937 claim as mooted or preempted by the CVPIA.

(3) Order filed May 31, 1995. The district court granted the Defendants summary judgment on the NEPA claim, but granted the Plaintiffs summary judgment on the ESA claim.

(4) Order filed January 16, 1997. The district court ordered the 14 contracts rescinded. The court concluded that the § 8/§ 5937 claim was not ripe.

(5) Order filed April 16, 1997. The district court amended the January 16, 1997, judgment and dismissed the Plaintiffs' substantive ESA claim without prejudice.

The Non-federal Defendants argue that: (1) the ESA did not apply to their contracts; (2) but if it did, the ESA was not violated; (3) but if the ESA was violated, the claim is moot; (4) but if there was an ESA violation that was not mooted, the remedy of contract invalidation was inappropriate. The Non-federal Defendants also argue that the CVPIA preempts § 5937. The Plaintiffs cross-appeal the grant of summary judgment to the Defendants on the NEPA claim and they appeal the court's conclusion that the § 8/ § 5937 claim was not ripe. The

Bureau is participating in the Plaintiffs' cross-appeal only.[2]

DISCUSSION

I. Endangered Species Act

A. Overview

Section 7(a)(2) of the ESA requires all federal agencies "to insure that any action authorized, funded, or carried out by such agency is not likely to jeopardize the continued existence" of any endangered or threatened species or result in the destruction of critical habitats. 16 U.S.C. § 1536(a)(2). If an agency determines that its proposed action "may affect" an endangered or threatened species, the agency must formally consult with the relevant Service, the FWS and/or the NMFS, depending on the species that are protected in the area of the proposed action. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir. 1994). After the formal consultation is completed, the relevant Service will issue a Biological Opinion evaluating the nature and extent of effect on the threatened or endangered species. If the Biological Opinion concludes that the proposed action is likely to jeopardize a protected species, the agency must modify its proposal. Section 7(d) of the ESA prohibits the "irreversible or irretrievable commitment of resources" during the consultation process. 16 U.S.C. § 1536(d).

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[2] The Bureau does not challenge the district court's determination that there was an ESA violation or the remedy of contract rescission.

As the district court observed, the ESA has "explicit substantive goal[s] which [are] served by its procedural requirements." Order of May 31, 1995 at 20 (citing *Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985)). The district court concluded that the contracts amounted to an "irreversible and irretrievable commitment of resources" and all contracts executed prior to completion of the required consultations with the FWS and the NMFS violated § 7(d). The district court invalidated all of the contracts which had been executed prior to the completion of the required consultations.

Judicial review of administrative decisions involving the ESA is governed by section 706 of the Administrative Procedure Act, 5 U.S.C. § 706. A court may set aside an agency action if it was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law" or if it was found to be "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1414 (9th Cir. 1990). The district court's summary judgment decision is reviewed de novo. *Forsyth v. Humana*, Inc., 114 F.3d 1467, 1474 (9th Cir.), *cert. denied*, 118 S.Ct. 559 (1997).

B. Applicability of the ESA

As a threshold question, the Non-federal Defendants argue that the ESA did not apply to the contract renewals because the renewals were not "agency action." *See* 16 U.S.C. § 1536(a)(2). This argument must fail. The term "agency action" has been defined broadly. In *TVA v. Hill*, 437 U.S. 153 (1978), the Court stated:

> One would be hard pressed to find a statutory provision whose terms were any plainer than those in § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or modification of habitat of such species. . . . " This language admits of no exception.

Id. at 173. *See also Pacific Rivers*, 30 F.3d at 1055 ("Following the Supreme Court's lead in TVA, we have construed 'agency action' broadly.") The regulation defining agency action states:

> Action means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies. . . . Examples include, but are not limited to: . . . the granting of licenses, contracts, leases, easements, rights-of-way, permits or grants in aid.

50 C.F.R. § 402.02. Clearly, negotiating and executing contracts is "agency action."

Orange Cove, the Madera Irrigation District (Madera) and Chowchilla Water District (Chowchilla) contend that the Bureau had no discretion to alter the terms of the renewal contracts, particularly the quantity of water delivered.[3] Where there is no agency discretion to act, the ESA does not apply. *Sierra Club v. Babbitt*, 65 F.3d 1502, 1509 (9th Cir. 1995). The federal reclamation laws, which

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[3] This issue was raised for the first time on a motion for reconsideration which the district court addressed in its Jan. 16, 1997, Order.

provided the right to renewal, state that the government is to renew the contracts on "mutually agreeable" terms, 43 U.S.C. § 485h-1(1), that water rights are based on the amount of available project water, 43 U.S.C. § 485h-1(4), and that the Secretary of the Interior (Secretary) has the discretion to set rates to cover an appropriate share of the operation and maintenance costs, 43 U.S.C. § 485h(e). Clearly, there was some discretion available to the Bureau during the negotiation process.

Orange Cove points to the opinion of the Solicitor of the Interior that the Bureau had no discretion for purposes of a NEPA analysis. Orange Cove argues that this opinion was entitled to deference. The opinion, however, only addresses the applicability of NEPA, not the ESA. Even if this opinion were relevant, the district court correctly concluded that the Solicitor's opinion was inconsistent with the requirements of the ESA. First, the opinion began from the premise that the government did not intend to make any substantial changes in the renewal contracts. The Solicitor, however, *did not* conclude that there was no discretion to change the terms of the contracts. He wrote:

> If the Secretary exercises his discretion to make other substantial changes in the contracts at the time of renewal, then analysis must be undertaken to determine whether the exercise of discretion qualifies for a categorical exclusion from preparation analysis under NEPA. . . . [While there is no discretion to alter the quantity of water received . . . the] Secretary has considerable discretion, however, to change other terms of the renewed contracts.

The Solicitor concluded that there was no discretion to change the quantity of water delivered under the contracts because the districts have "a first right . . . to a stated share or quantity of the project's available water supply. . . . " (Citing 43 U.S.C. § 485h-1(4)). The Solicitor, however, assumed that the "project's *available* water supply" included all of the Friant dam water, and he did not address the issue of whether the total amount of available project water could be reduced in order to comply with the ESA or state law. *See O'Neill v. United States*, 50 F.3d 677, 686 (9th Cir. 1995) (noting that an agency can deliver less than a contractually agreed upon amount of water in order to comply with subsequently enacted federal law). Therefore, even if the original contracts guaranteed the Non-federal Defendants a right to a similar share of available water in the renewal contracts, the Bureau had discretion to alter other key terms in the contract, and the Bureau may be able to reduce the amount of water available for sale if necessary to comply with ESA.

C. Procedural Violations of the ESA

1. Failure to Consult with the NMFS

Before initiating any agency action in an area that contains threatened or endangered species or a critical habitat, the agency must (1) make an independent determination of whether its action "may affect" a protected species or habitat, or (2) initiate a formal consultation with the agency that has jurisdiction over the species. *See generally Peterson*, 753 F.2d at 763. If an agency determines that an action "may affect" critical species or habitats, formal consultation is mandated. *Id.*; 50 C.F.R. § 402.14(a).

Formal consultation is excused only where (1) an agency determines that its action is unlikely to adversely affect the protected species or habitat, *and* (2) the relevant Service (FWS or NMFS) concurs with that determination. 50 C.F.R. § 402.14(b); *see Pacific Rivers*, 30 F.3d at 1054, n.8.

The NMFS has jurisdiction over the winter-run chinook salmon, which was listed as a threatened species prior to execution of all but one of the water contracts. The Bureau independently determined that the renewal contracts and recommitment of all the Friant dam's water were not likely adversely to affect the salmon. The Bureau then sought the NMFS' concurrence with that assessment. On November 1, 1991, the Director of the NMFS refused to concur in the Bureau's opinion that the salmon would not be adversely affected. However, the NMFS also stated that formal consultation was not required. The Director wrote:

> While we disagree with the Bureau's determination that renewal of the Friant contracts are not likely to affect the winter-run [chinook salmon] adversely . . . we do not believe that a formal consultation on the Friant contract renewals is necessary. . . . [T]he issue of delta exports is being addressed in our ongoing consultation on the CVP . . . and we believe this will allow us to address the adverse impacts from the activities interrelated to the renewal of the Friant contracts.

The Bureau then proceeded to execute the water contracts without requesting a formal consultation with the NMFS. The Bureau argued that it reasonably relied on the NMFS' determination that a formal consultation was unnecessary.

The Non-federal Defendants cite *Stop H-3 Ass'n v. Dole*, 740 F.2d 1442 (9th Cir. 1984), and *Pyramid Lake*, 898 F.2d 1410, to support their argument that the Bureau's reliance on the NMFS opinion was not arbitrary and capricious. These cases, however, do not support the Non-federal Defendants' position. Unlike both *Stop H-3* and *Pyramid Lake*, the issue in this case is not whether the Bureau was arbitrary and capricious in relying on a properly issued Biological Opinion. Instead, the issue is whether the Bureau was arbitrary and capricious when it relied on the NMFS' view that a consultation was not necessary, despite NMFS' refusal to provide the required concurrence. By relying on the NMFS in this case, the Bureau did not meet its independent responsibilities under the ESA.

The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14. Under those circumstances, regardless of the NMFS position that a formal consultation was "unnecessary," the Bureau had a clear legal obligation to at least request a formal consultation. *See* 50 C.F.R. §§ 402.13, 402.14. The reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligations to ensure that its proposed actions were not likely adversely to affect the salmon. The district court did not err in concluding that it was arbitrary and capricious for the Bureau to forgo a formal consultation with the NMFS where the NMFS specifically refused to provide the

required concurrence of "no adverse impact." Where the Bureau executed these 40-year contracts without first obtaining either the required concurrence from NMFS that the proposed action was not likely to affect a threatened species or a properly issued NMFS "no jeopardy" Biological Opinion, the Bureau acted arbitrarily and capriciously and not in accordance with the law. Therefore, all of these contracts were subject to rescission.

2. Untimely Consultation with the FWS

In addition to failing to request and follow through with a required consultation with NMFS, the Bureau also failed to follow its obligations under law with respect to its consultation with the FWS. The FWS has jurisdiction over several protected species in the Friant area, and the Bureau informally consulted with the FWS during 1990 and 1991. Formal consultation was requested on May 22, 1991. The FWS issued a "no jeopardy" Biological Opinion on October 15, 1991. Ten of the Friant contracts had already been executed by that time. The contracts contained Article 14, which allowed some contract modification pursuant to environmental review, and all but one of the contracts contained a provision modifying the terms dependent on the outcome of this litigation.[4]

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[4] The Orange Cove contract did not include this provision. That contract was the first contract renewed and it was executed prior to the court's order requiring all future contracts to contain such a provision. However, the Bureau and the FWS had informally consulted and mutually agreed that the Orange Cove contract was not likely adversely to affect any listed species.

Section 7(d) of the ESA provides:

> After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

16 U.S.C. § 1536(d); *see* 50 C.F.R. § 402.09. The district court concluded that the 40-year water contracts constituted an irreversible and irretrievable commitment of resources and that the Bureau was not permitted to proceed until FWS found that the contracts were not likely to affect a protected species.[5] *See* Pacific Rivers, 30 F.3d at 1056 (following discussion of § 7(a)(2) and § 7(d), court concluded that "timber sales constitute per se irreversible and irretrievable commitment of resources"); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992).

The Non-federal Defendants insist that even if the water contracts are an irreversible and irretrievable commitment of resources, Article 14 prevented the foreclosure of reasonable and prudent alternatives and, therefore, § 7(d) was not violated. We do not think that an agency should be permitted to skirt the procedural

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[5] The district court also concluded that there was a *per se* violation of the ESA even if the contracts in this case were not an irreversible and irretrievable commitment of resources. We need not decide whether the district court was mistaken because there was an irreversible and irretrievable commitment of resources.

requirements of § 7(d) by including such a catchall savings clause in illegally executed contracts. However, even if such a clause could preserve the contracts, Article 14 is inadequate to serve that purpose here because it limits conservation-based modifications to minor adjustments and prohibits an adjustment in the amount of water delivered. Because Article 14 does not permit a reduction in the quantity of water delivered, the reasonable and prudent alternative of reallocating contracted water from irrigation to conservation is foreclosed. The district court did not err in concluding that the Bureau violated § 7(d) when it executed the contracts prior to completing the formal consultation process with the FWS, and the contracts executed prior to the issuance of the FWS Biological Opinion are subject to rescission.[6]

3. Mootness

The Non-federal Defendants argue that if the Bureau violated the ESA by executing the water contracts prior to the issuance of the FWS Biological Opinion, this claim became moot once a "no jeopardy" biological Opinion was issued on October 15, 1991.[7] In the May 31, 1991,

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[6] The district court also correctly concluded that if the Bureau is not permitted to execute contracts that constitute an irreversible and irretrievable commitment of resources *during* the formal consultation, it also was not permitted to do so *before* it had initiated formal consultation. *See* 16 U.S.C. § 1536(d); *Pacific Rivers*, 30 F.3d at 1056-57; *Conner v. Burford*, 848 F.2d 1441, 1455 (9th Cir.1988). Therefore, all contracts executed prior to May 22, 1991, violated the ESA.

[7] This argument only applies to the ESA violation arising out of the FWS consultation process. Even if the untimely FWS

Order, the district court concluded that the Biological Opinion did not moot the procedural ESA violations because the issuance of the Biological Opinion did not provide all the relief that could have been granted. The district court concluded that an appropriate remedy was still available – contract rescission – which would place the Plaintiffs in the position they would have been had the ESA been complied with before execution of the contracts.

Mootness is a question of law reviewed de novo. *Native Village v. Blatchford*, 38 F.3d 1505, 1509 (9th Cir. 1994). The Non-federal Defendants rely on *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724 (10th Cir. 1997), as persuasive authority that the ESA claim was mooted. In *Southern Utah* an informal consultation completed after the agency action mooted the ESA claim. However, *Southern Utah* is distinguishable because (1) there was no irreversible and irretrievable commitment of resources, and (2) the only relief requested was the completed consultation.

Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The process, which was not observed here, itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly factored into the decision-making process as intended by Congress. Also,

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consultation could be mooted by the issuance of a "no jeopardy" opinion, the failure to consult with NMFS still renders the contracts subject to rescission.

due to the procedural violations here, the Plaintiffs' ability to enjoin the agency action while they challenged the validity of the Biological Opinion was negated.[8]

Here, if the Biological Opinion had been rendered before the contracts were executed, the FWS would have had more flexibility to make, and the Bureau to implement, suggested modifications to the proposed contracts. *See* 50 C.F.R. § 402.14(g)(6), (j) (Service's responsibilities include formulating "discretionary conservation recommendations, if any, which will assist . . . agency in reducing or eliminating the impacts it may have on listed species or critical habitats"). Even where there is a "no jeopardy" Biological Opinion, the Service may make nonbinding conservation recommendations. 50 C.F.R. § 402.14(g)(6), (j). The failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal.

D. Remedy of Contract Rescission

Where an agency acts arbitrarily or capriciously or not in accordance with the law, the APA states that the court shall set aside the agency action. 5 U.S.C. § 706(2)(A)-(D). While the court had the discretion to preserve the contracts if the procedural flaw could have been rectified in another way, *see Weinberger v. Romero-*

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[8] In the district court, the Plaintiffs challenged the validity of the FWS "no jeopardy" Biological Opinion. This claim was dismissed without prejudice because the contract rescission offered complete relief.

Barcelo, 456 U.S. 305, 320 (1982), there is no reason to compel that result here.

In *Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1230 (9th Cir. 1988), the court stated that "the proper remedy for substantial procedural violations of NEPA and the ESA is an injunction." In that case, however, the government had been enjoined by the district court from entering into more leases and the leases that were already entered into were set aside. Also, the agency action at issue did not appear to involve an irreversible and irretrievable commitment of resources. In Forelaws on *Board v. Johnson*, 743 F.2d 677, 685 (9th Cir. 1984), although we refused to issue an injunction, we noted that for NEPA violations, injunctions served the purpose of "preserv[ing] the decision makers' opportunity to choose among policy alternatives." *Id.* Where contracts have already been entered into, the opportunity to "choose" has been eliminated – all that remains is the limited ability to make the path chosen as palatable as possible. Therefore, an injunction would not serve any purpose if the contracts are not invalidated. We conclude that the district court's decision to rescind the contracts was not an abuse of discretion.

E. Unique Issues Related to Particular Contracts

1. Orange Cove

Orange Cove is uniquely situated from the rest of the Non-federal Defendants. First, the Orange Cove contract was the only contract that was executed after the Bureau and the FWS had concurred that the contract was not

likely adversely to affect any protected species. Therefore, for the Orange Cove contract alone, a formal consultation with the FWS was not required before contract execution and the ESA was not violated on those grounds.

The district court concluded, however, that even though the ESA was not violated because of a flawed FWS consultation, the failure to consult with the NMFS before executing the Orange Cove contract resulted in a procedural violation. The Orange Cove contract, however, was also the only contract executed before the winter-run chinook salmon was listed as threatened in August of 1989. Orange Cove argues that because its contract was executed before the salmon was listed, the Bureau had no duty to consult with the NMFS, formally or informally, under the ESA.

The district court, on Orange Cove's motion for reconsideration, concluded that until Orange Cove had the contract validated in state court,[9] the Bureau had the

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[9] Clause 30 of the Orange Cove contract provides as follows:

> The Contractor, after execution of this contract, shall promptly seek to secure a decree of a court of competent jurisdiction of the State of California, confirming the execution of this contract. The Contractor shall furnish the United States a certified copy of the final decree, the validation proceedings, and all pertinent supporting records of the court approving and confirming this contract, and decreeing and adjudging it to be lawful, valid, and binding on the Contractor. *This contract shall not be binding on the United States until such final decree has been secured.*

Contract between the United States and the Orange Cove Irrigation District (emphasis added).

power and the obligation to withdraw the contract and initiate consultation with the NMFS after the salmon was listed in August, 1989. Orange Cove argues that the district court improperly decided the validation argument because it was not addressed by the parties in their summary judgment briefs. Orange Cove also argues that the district court erred as a matter of law.

Orange Cove implicitly raised the validation argument when it moved for reconsideration and pointed out to the court that its contract was executed prior to the threatened species listing. The Orange Cove contract, on its face, states that it is not binding on the United States until it is validated in state court. Both sides had an opportunity to address this argument in writing a year before the district court issued its January 16, 1997, Order.

Orange Cove argues that after the contract was executed in May, 1989, there was no "agency action" that would require reinitiation of an ESA consultation. However, even though the government was not under a contractual obligation to deliver water to Orange Cove from February 28, 1989, until February 22, 1990, the government continued to do so and that activity constituted discretionary agency action. The ESA regulations state that "[r]einitiation of formal consultation is required and shall be requested . . . where discretionary Federal involvement or control over the action has been retained or is authorized by law and . . . a new species is listed. . . . " 50 C.F.R. § 402.16. The discretionary activity of delivering water without a contract, coupled with the fact that the Orange Cove contract explicitly stated that the United States was not bound by the contract until it was validated in state court, support the district court's conclusion that the

Bureau had an obligation to withdraw the contract and initiate an NMFS consultation once the salmon was listed. *See Pacific Rivers*, 30 F.3d at 1053-56 (ESA consultation required for ongoing projects once new threatened species listed). We conclude that the district court did not err in setting aside the Orange Cove contract.

2. Chowchilla and Madera

Chowchilla and Madera argue that their contracts are unique from the other Non-federal Defendants because Madera and Chowchilla had originally possessed the land where the Friant dam was built and had adjudicated rights to the water of the San Joaquin River. In return for conveying the land and the water rights to the United States, Madera and Chowchilla argue that their 1939 contracts guaranteed a permanent supply of water from the Friant dam of 270,000 acre feet of water annually. That contract was replaced by a 1951 contract. Madera and Chowchilla argue that when the 1951 contract expired, they were reinvested with their rights under the 1939 contract and, therefore, they are exempt from the ESA. However, in *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir. 1993), the court concluded that these districts are not exempt from requirements under NEPA and the ESA. Chowchilla's and Madera's arguments to the contrary are without merit.

3. Chowchilla, Terra Bella and Delano-Earlimart

Chowchilla, the Terra Bella Irrigation District and the Delano-Earlimart Irrigation District argue that even

though their contracts were executed by the Bureau prior to the issuance of the FWS Biological Opinion, all three were validated by the state court after the October 15, 1991, "no jeopardy" Biological Opinion was issued. Therefore, they argue that the validation date serves to keep their contracts from violating the ESA.

This argument was not raised in the district court and we decline to consider it for the first time on appeal. *See Parks Sch. of Bus., Inc. v. Symington*, 51 F.3d 1480, 1487 n.4 (9th Cir. 1995) (failure to raise issue before the district court constitutes a waiver of that issue).

II. National Environmental Policy Act

NEPA requires all federal agencies to consider the environmental consequences of all "major Federal actions significantly affecting the quality of the human environment" by preparing an EIS before undertaking the action. 42 U.S.C. § 4332(2)(C). Instead of preparing an EIS, an agency may make a factual determination that an EIS is unnecessary by conducting an environmental assessment (EA) of its proposed action and issuing a Finding of No Significant Impact (FONSI) on the environment. *See* 40 C.F.R. § 1501.4; *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1193 (9th Cir. 1988). NEPA is not retroactive and only applies to major agency actions that occurred after 1969.

It is undisputed that the Bureau did not prepare an EA or an EIS before renewing these water contracts. The Bureau argues that there is no need for this court to address the NEPA issue because if these 14 contracts are rescinded, then the Plaintiffs have received complete

relief. The CVPIA requires the government to complete an EIS before it may enter into any subsequent Friant renewal contracts. CVPIA, Pub.L. 102-575, § 3404(c)(1), 1992 U.S.C.C.A.N. (106 Stat.) at 4709. Where intervening legislative changes settle a controversy, the action may be moot. *Nevada v. Watkins*, 943 F.2d 1080, 1083 (9th Cir. 1991). We conclude that the NEPA issue has been mooted by the remedy of contract rescission and CVPIA's requirement that an EIS be completed on this dam before the re-execution of the contracts.

III. Section 5937 of the Fish and Game Code

Section 5937 of the California Fish and Game Code states:

> The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam.

In the Order of April 30, 1992, the district court concluded that the Bureau was not exempt from § 5937 and denied the motion to dismiss. *See* 791 F.Supp. at 1431-36. The district court also concluded that the CVPIA did not preempt § 5937. *See* Order of October 7, 1993. In the January 16, 1997, Order, the district court concluded that, due to the contract invalidations, the § 5937 claim was not ripe. We hold that the district court erred and remand for a determination on the merits.

Ripeness is a question of law reviewed de novo. *San Diego County Gun Rights Comm. v. Reno*, 98 F.3d 1121, 1124

(9th Cir. 1996). A case is generally considered ripe if: (1) the relevant issues are sufficiently focused to permit judicial resolution without further factual development, *see Clinton v. Acequia, Inc.*, 94 F.3d 568, 572 (9th Cir. 1996); and (2) the parties would suffer a hardship by the postponement of judicial action, *see Abbott Lab. v. Gardner*, 387 U.S. 136, 149 (1967). Where the Bureau is not complying with § 5937 and its obligation to comply with § 5937 is in dispute, a determination of the § 5937 issue is ripe. The rescission of the 14 water contracts is unrelated to the timeliness of the § 5937 claim. The § 5937 claim is directed towards the owner of the dam, the Bureau, whose duty to comply with state law, if the law applies, exists independent of any contractual arrangements with the Non-federal Defendants.

The Non-federal defendants challenge the district court's ruling that § 5937 was not, on its face, preempted by federal law. We affirm on the facial preemption issue.

Section 8 of the Reclamation Act provides:

> Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws. . . .

43 U.S.C. § 383. In *California v. United States*, 438 U.S. 645 (1978), the Court stated that the "cooperative federalism" of § 8 required the United States to comply with state water laws unless such a law was directly inconsistent

with clear congressional directives regarding the project. *Id.* at 650, 678. On remand to the Ninth Circuit, this court concluded that the term "congressional directive" meant a preemptive federal statute. *United States v. California*, 694 F.2d 1171, 1176-77 (9th Cir. 1982).

The CVPIA provides that Friant dam water is not to be released from the Friant dam to comply with the provisions of the CVPIA regarding the development of a plan to reestablish fish below the dam. CVPIA, Pub.L. No. 102-575, § 3406(c)(1), 1992 U.S.C.C.A.N. (106 Stat.) at 4721.[10] The Non-federal Defendants argue that this provision is a clear congressional directive that water is not to be released from the Friant dam pursuant to any law, state or federal, until it is specifically approved by Congress. However, the statute states that there are not to be any releases of the Friant dam water "as a measure to implement this title," this title being the CVPIA. It would have been a simple matter for Congress to bar the release of Friant dam water, without including the clause "as a measure to implement this title" twice in the same sentence. There is no clear directive in the CVPIA which

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[10] Section 3406(c)(1) of the CVPIA provides:

> The Secretary shall . . . develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River . . . During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan . . . the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

preempts the application of § 5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the Friant dam in a manner that is "reasonable, prudent, and feasible." CVPIA, Pub.L. 102-575, § 3406(c), 1992 U.S.C.C.A.N. (106 Stat.) at 4721.

The district court, as the Bureau points out, never explicitly ruled that § 5937 applied to the Friant dam. There are several other issues that the district court did not address. For example, the district court did not determine whether § 5937 is applicable to the Friant dam under state law. It is preferable to determine whether the state law applies before reaching a determination that state law has been preempted. The district court also did not reach the issue of whether the actual application of § 5937 is inconsistent with the CVPIA. It has yet to be determined how much water release would be required under § 5937 and whether that would be consistent with the CVPIA. We remand these issues to the district court for a determination on the merits.

IV. Improper Use of Evidence

With their summary judgment motion, the Plaintiffs filed three expert affidavits which addressed the environmental impacts of the Friant dam. The Non-federal Defendants filed a motion to strike these affidavits which the court denied. The Non-federal Defendants claim that these affidavits addressed disputed factual issues, and that they were not permitted to cross-examine the experts or conduct discovery to respond to the assertions in the affidavits. In the Order of May 31, 1995, the district court

appears to rely on these affidavits, in part, and stated that the Plaintiffs' "extensive scientific ecological evidence documents" indicated that the total diversion of the river caused environmental harm. The Non-federal Defendants contend that the district court abused its discretion in denying further discovery in violation of Fed.R.Civ.P. 56(f). The Non-federal Defendants also claim that the affidavits were irrelevant to the legal questions at hand.

We review the district court's discovery rulings for an abuse of discretion. *Amarel v. Connell*, 102 F.3d 1494, 1515 (9th Cir. 1996). The district court may continue a motion for summary judgment if the opposing party needs time to conduct further discovery. *See* Fed.R.Civ.P. 56(f); *Garrett v. City and County of San Francisco*, 818 F.2d 1515, 1518 (9th Cir. 1987). A refusal to permit further discovery pursuant to Rule 56(f) is reviewed for an abuse of discretion. *Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 920 (9th Cir. 1996), *cert. denied*, 118 S.Ct. 369 (1997). "We will only find that the district court abused its discretion if the movant diligently pursued its previous discovery opportunities, and if the movant can show how allowing additional discovery would have precluded summary judgment." *Qualls v. Blue Cross of Cal., Inc.*, 22 F.3d 839, 844 (9th Cir. 1994).

The Non-federal Defendants' Rule 56(f) argument is without merit. The Non-federal Defendants never formally filed a Rule 56(f) motion requesting a continuance of the summary judgment hearing to conduct further discovery. They contend that their motion to strike should have served as a Rule 56(f) motion. But that motion, which was not made until six months after the summary judgment decision was issued, was clearly

untimely for Rule 56(f) purposes. Regardless of whether the Non-federal Defendants raised a timely 56(f) motion or diligently pursued discovery, the Non-federal Defendants have not pointed to any evidence that they could have discovered that would have precluded summary judgment. *See Garrett*, 818 F.2d at 1518.

On the relevancy issue, the Plaintiffs assert that the expert affidavits were relevant to the legal issue of whether the water contracts were an irreversible and irretrievable commitment of resources. The district court did rely on the declarations regarding environmental harm to conclude that there was an irreversible and irretrievable commitment of resources. However, it appears that the court could have reached the same legal conclusion without any concrete evidence of ecological harm. *See Pacific Rivers*, 30 F.3d at 1057 (timber sales constitute per se irreversible and irretrievable commitment of resources). Therefore, if there were any error it was harmless.

CONCLUSION

We conclude that the Bureau violated the ESA by making irreversible and irretrievable commitments of resources prior to completing the required consultations with the FWS and the NMFS. The remedy of contract rescission was well within the district court's discretion. The NEPA issue is moot. However, we reverse the holding that the § 5937 claim was unripe and remand for a determination of that issue. The Plaintiffs shall recover their costs on appeal from the Non-federal Defendants.

The Federal Defendants shall bear their own costs on appeal.

AFFIRMED in part, REVERSED and REMANDED in part.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Plaintiffs,

v.

ROGER PATTERSON, etc., et al.,

Defendants.

/

ORANGE COVE IRRIGATION DISTRICT, et al.,

Defendant-Intervenors.

/

NO. CIV. S-88-1658 LKK

ORDER

(Filed Oct. 12, 1993)

This matter is before the court on defendants' motion to dismiss pursuant to Fed. R. Civ. P. 12 (b) (1) and 12 (b) (6) . For the reasons stated below, defendants' motion will be denied. As the length of this order demonstrates, the reasons for denial are complex. In an effort to make clear the reasons for this disposition, I begin with a review of the case's procedural history thereby putting this motion in context.

I

PRIOR PROCEEDINGS

Plaintiffs, various environmental groups, originally filed suit against officers of the Bureau of Reclamation

("Bureau") on December 21, 1988. They sought to prevent the Bureau from entering 28 renewal contracts to supply water from the Friant Dam unit of the Central Valley Project. The 28, 40-year water contracts at issue were first entered into by the Secretary of the Interior, acting through the Bureau, beginning in 1949. On February 28, 1989, the first of these contracts expired.

Beginning in approximately June 1988, the Bureau engaged in formal negotiations with the defendant irrigation districts to develop a new form of long-term contract. On November 2, 1988, the Bureau announced completion of negotiations with Orange Cove Irrigation District, the first of the renewed contracts. on April 4, 1989, and before any further contracts were renewed, the court denied plaintiffs' motion for a preliminary injunction enjoining the negotiation, implementation, and execution of the renewal of all Friant Unit water service contracts, conditioned upon each subsequent renewal of any contract prior to the final order in this case containing the following provision: "The terms of this contract are subject to the final order in *NRDC v. [Patterson]*, No. CIV-S-88-1658-LKK-[GGH]." Order filed April 4, 1989. Subsequent negotiated amendments were ordered to contain similar language.

Plaintiffs' original complaint alleged that the Bureau was renewing those contracts in violation of the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4332, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701-06, and various federal regulations and guidelines promulgated under those statutes. On February 6, 1989, plaintiffs filed their first amended complaint adding a claim based on defendants' alleged violation of the

Endangered Species Act (ESA), 16 U.S.C. § 1536. By order filed February 6, 1989, non-federal defendant irrigation districts were permitted to intervene as defendants in this action.

On January 7, 1992, plaintiffs were granted leave to amend to assert an APA claim premised on the Bureau's alleged violation of Section 8 of the Reclamation Act of 1902 ("Section 8"), 43 U.S.C. §§ 372, 383. That complaint was filed on February 4, 1992. Plaintiffs maintain that Section 8 mandates compliance by the Bureau, as owner of Friant Dam, with California Fish & Game Code § 5937 and that the Bureau has failed to comply with this state law.

On April 30, 1992, this court denied defendants' motion to dismiss this fourth cause of action. *See NRDC v. Patterson*, 791 F. Supp. 1425 (E.D. Cal. 1992). The parties cross-moved for summary judgment on plaintiffs' NEPA and ESA claims on May 19, 1992. Plaintiffs additionally moved for summary judgment as to the section 5937 claim. Following a Status (Pretrial Scheduling) Conference on June 3, 1992, in an effort to trim this complex case to manageable proportions, a special hearing was set for arguments relative to the NEPA discretion issue, i.e., whether the government had discretion to renew the water contracts thereby implicating NEPA and requiring that an Environmental Impact Statement ("EIS") be prepared. In addition, hearing on the ESA motions were stayed, plaintiffs were granted 15 days to amend their ESA claim, and federal defendants were to begin compiling the administrative record relative to this claim. It was

also determined that plaintiffs' motion addressing its section 5937 claim would not be heard until resolution of various additional motions to be filed by defendants.

Plaintiffs filed their third amended complaint on June 17, 1992. The amended complaint added to their ESA claim allegations that the Secretary's reliance on the October 15, 1991 Biological Opinion is unreasonable, arbitrary, capricious and thus not in accordance with ESA.

Following the August 21, 1992 special hearing, this court set for special hearing, on September 17, 1992, defendants' motion for joinder of the State Water Resources Control Board and the remaining issues relative to the NEPA claim, i.e., whether the renewal of water contracts by the Bureau is categorically excluded from NEPA review, and whether contract renewal should be considered a continuation of the status quo thus excluding the renewal from NEPA review.

Following the September 17, 1992 hearing, by order dated September 21, 1992, this court ordered further briefing relative to the NEPA claim, specifically, whether the Bureau has discretion in setting the rate terms of the renewal contracts, and the relevance of the 40-year maximum period for renewal of water contracts. Defendants filed their supplemental brief on October 20, 1992. Defendants' joinder motion was denied on January 8, 1993.

On October 30, 1992, former President Bush signed into law the Reclamation Projects Authorization and Adjustment Act of 1992. Pub. L. No. 102-575 (1992). Title XXXIV of this Act, the Central Valley Project Improvement Act ("CVP Improvement Act"), 106 Stat. 4706-31 (1992), appeared to dramatically alter the nature of this

litigation. Thus, on December 7, 1992, a further status conference was held to determine the future course of this litigation. Following that conference, by order filed December 14, 1992, the court vacated the order taking under submission the cross-motions for summary judgment on the NEPA claim and stayed further proceedings on that issue, directed defendants to file a motion to dismiss in light of the CVP Improvement Act, and granted plaintiffs leave to file an amended complaint. Plaintiffs filed their fourth amended complaint on December 18, 1992. Until the filing of this fourth amended complaint, plaintiffs' initial complaints sought, inter alia, an order from the court voiding or rescinding the 28 contracts or amendments to contracts entered into by defendants for the deliveries of water from Friant Dam which were not in compliance with NEPA, ESA, and regulations promulgated thereunder, the Department of the Interior Manual, Section 8, or the APA, and preliminary and permanent injunctive relief requiring the preparation of all environmental documents required by law, including a programmatic EIS and a proper biological assessment and biological opinion before any further action is taken in connection with the negotiation, approval, execution or implementation of the new Friant contracts or amendment of the Original Orange Cove Irrigation District or other contracts. At the time the CVP Improvement Act was enacted, 14 of those contracts had yet to be renewed or amended. Because the CVP Improvement Act specifically mandated that the Bureau prepare a programmatic EIS before it enters or renews any long-term water service contracts for the delivery of Central Valley Project water, CVP Improvement Act

§§ 3404(c) and 3409, plaintiffs' fourth amended complaint no longer seeks relief relative to the contracts that have not yet been renewed.[1] Instead, they now seek an order declaring the Bureau's actions contrary to law and

> Judgment voiding or rescinding any contracts, or amendments to contracts, entered into by defendants for the deliveries of water from Friant Dam which are not in compliance with NEPA, ESA, regulations promulgated thereunder, the DOI Manual, Section 8 or the APA.

Fourth Amended Complaint at 40. Plaintiffs also seek

> Preliminary and permanent injunctive relief requiring the Bureau to comply fully with Section 8, Section 5937 and the APA by allowing

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[1] Although at oral argument and in their papers filed in opposition to defendants' motion plaintiffs' only remaining NEPA/ESA dispute appears to be with the execution of those contracts already renewed subsequent to their expiration, some of the language in plaintiffs' third request for relief appears to request relief as to contracts not yet renewed. Plaintiffs' third request for relief seeks "[p]reliminary and permanent injunctive relief requiring the preparation of all environmental documents required by law, including a Programmatic EIS and a proper biological assessment and proper biological opinions, and compliance with all other provisions of NEPA and ESA, before any further action is taken in connection with the negotiation, approval, execution or implementation of the original Orange Cove Irrigation District or other contracts." Because defendants can no longer argue that NEPA is inapplicable to their actions in connection with these contracts or that they need not properly comply with ESA in this regard and because these contracts have yet to be negotiated, approved, executed, or implemented, insofar as plaintiffs seek an order mandating compliance with these statutes, their claim for injunctive relief is not ripe and will not be addressed.

> sufficient water to pass over, around or through the Dam to keep in good condition fish life below Friant Dam.

Id.

Defendants now move to dismiss plaintiffs' entire complaint.

II

MOOTNESS

Defendants concede that the CVP Improvement Act established that the Bureau must conduct an EIS for each of the water contracts renewed since January 1, 1988. Although filing separate motions, both federal and non-federal defendants argue that the NEPA and APA claims (collectively referred to as the "NEPA claims") are mooted by the CVP Improvement Act.

Plaintiffs oppose the motion. They note that their fourth amended complaint does not challenge the Secretary's decision to negotiate or execute the 14 contracts which have not yet been renewed. However, as to the 14 which have been renewed, plaintiffs argue that they were renewed in violation of NEPA and ESA, are illegal, and therefore should be rescinded, thus subjecting them to the same requirements as those contracts that have yet to be renewed. The CVP Improvement Act, they argue, does not excuse past NEPA and ESA violations.

A. Standards to be Applied

Where Congress has taken action which has rendered a case moot, there is no "case or controversy" for Article

III purposes and the federal court thus lacks jurisdiction. *State of Nevada v. Watkins*, 943 F.2d 1080, 1083 (9th Cir. 1991). Thus, a mootness attack necessarily constitutes an attack on the court's subject matter jurisdiction pursuant to Fed. R. Civ. P. 12(b)(1). The standards to be applied on such a motion are well known and need not be set forth here. *ITSI T.V. Productions v. Cal. Auth. of Racing Fairs*, 785 F. Supp. 854, 857-58 (E.D. Cal. 1992), *aff'd in part, rev'd in part*, ___ F.2d ___, 1993 WL 327132 (9th Cir., Aug. 31, 1993). Where, as here, the challenge is a facial attack, the plaintiff is entitled to safeguards similar to those applicable when a Rule 12 (b) (6) motion is made. *See, e.g., NRDC*, 791 F. Supp. at 1428-29.

The party seeking to dismiss a claim on mootness grounds is said to bear a "heavy" burden. *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015 (9th Cir. 1989).

B. Analysis

"A moot action is one where the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Headwaters*, 893 F.2d at 1015. Where intervening legislative changes settle a controversy, the action may be moot. *State of Nevada*, 943 F.2d at 1083; *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1432 (9th Cir. 1989). *See also* 13A Wright, Miller & Cooper, *Federal Practice and Procedure* § 3533.6. While an intervening legislative act may moot some claims, so long as other claims or alternative grounds for resolving the issue remain, the action is not mooted. *Daingerfield Island Protective Soc. v. Lujan*, 920 F.2d 32, 36-37 (D.C. Cir. 1990), *cert. denied*, 112

S. Ct. 54 (1991); *Montana Wilderness Ass'n v. U.S. Forest Service*, 655 F.2d 951, 958 (9th Cir. 1981), *cert. denied*, 455 U.S. 989 (1982). The "critical question" in determining mootness is whether a court may grant "any effective relief." *State of Nevada*, 943 F.2d at 1083. Thus, even though a plaintiff may avail himself of relief provided by newly-enacted legislation which is essentially the same as that sought under the litigation, a plaintiff maintains sufficient interest to permit him to continue his action where variances, such as delayed relief, exist in the relief available pursuant to the new legislative act. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 426 n.3 (1987).

1. NEPA Claim

CVP Improvement Act § 3404(c), the section permitting renewal of existing long-term water delivery contracts, amends the 1956 Act allowing for 40-year contracts to permit the Bureau to renew, contracts for lengths not to exceed 25 years. It further provides:

> With respect to all contracts renewed by the Secretary since January 1, 1988, the Secretary shall incorporate in said contracts a provision requiring payment of the charge mandated in subsection 3406(c) and subsection 3407(b) of this title and all other modifications needed to comply with existing law, including provisions of this title. This title shall be deemed "applicable law" as that term is used in Article 14(C)[2] of

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[2] Relevant portions of Article 14(c) in each of the contracts, with the exception of the Orange Cove contract, provide: "Notwithstanding any other provisions of this contract . . . the

> contracts renewed by the Secretary since January 1, 1988.

CVP Improvement Act § 3404(c)(1).

CVP Improvement Act section 3409, the section relating to environmental review, provides in relevant part as follows:

> Not later than three years after the date of enactment of this title, the Secretary shall prepare and complete a programmatic environmental impact statement pursuant to the National Environmental Policy Act analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts.

CVP Improvement Act § 3409.

Because section 3409 of the CVP Improvement Act mandates that a programmatic EIS be prepared regarding

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provisions of this contract covering right to long-term renewal and quantity of water are non-discretionary and not subject to change except as required by applicable law."

The Orange Cove contract had a different provision, although its effect due to the change in law is similar. Section 14(a) provides "The parties agree that the delivery of water or the use of the Federal facilities pursuant to this contract is subject to Reclamation law, as amended and supplemented, including, but not limited to, the RRA." Because the CVP Improvement Act amended reclamation law, *see* section 3408(g) ("Reclamation- Law. – This title shall amend and supplement the Act of June 17, 1902, the Act supplementary thereto and amendatory thereof") , it clearly applies under the contract provisions as "applicable law."

the effects of renewal of the water contracts, and because CVP Improvement Act § 3404 mandates that the Secretary incorporate in all contracts, even those already renewed, a provision requiring compliance with the provisions of the CVP Improvement Act, including conducting the EIS, plaintiffs no longer seek relief as to the 14 contracts remaining to be negotiated and executed.

Plaintiffs request, however, that the contracts already executed allegedly in violation of NEPA and the APA be voided and rescinded. If this court granted their requested relief, under the CVP Improvement Act those contracts would essentially convert from being "contracts already renewed" to "contracts up for renewal which have expired prior to the completion of an EIS." Under the CVP Improvement Act, "contracts up for renewal" can be renewed for no greater than 3-year intervals, and for successive interim periods of not more than two years in length, until the EIS is completed. Section 3404(c)(1). Thus accepting as true plaintiffs' allegations that defendants entered those contracts in violation of NEPA and the APA, the current 25-year[3] contracts would be rescinded and the longest time for which they could be renewed initially is three years.

The potential impact of this result is substantial because as the renewed contracts now stand, they have been renewed prior to completion of an EIS. As explained by the Supreme Court, while NEPA does not "mandat[e]

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[3] Although these contracts were initially entered as 40-year contracts, section 3404(c) of the CVP Improvement Act effectively amended them to 25-year contracts. This suit raises no issue as to the propriety of such legislation.

that agencies achieve particular substantive environmental results," *Marsh v. Oregon Nat. Resources Council*, 490 U.S. 360, 371 (1989), its purpose is "to prevent or eliminate damage to the environment and biosphere by focusing Government and public attention on the environmental effects of proposed agency action. *Id. See also Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989). Such attention is to be focused "before decisions are made and before actions are taken," 40 C.F.R. § 1500.1(b), and at a time to ensure that they "will not be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.[4] *See also Friedman Bros. Inv. Co. v. Lewis*, 676 F.2d 1317, 1320 (9th Cir. 1982) ("the purpose of an EIS is to provide decisionmakers with the information required to evaluate the environmental impact of their decision before they make it"). As explained by the First Circuit, "NEPA's object is to minimize . . . the risk of uninformed choice, a risk that arises in part from the practical fact that bureaucratic decisionmakers (when the law permits) are less likely to tear down a nearly completed project than a barely started project." *Sierra Club*, 872 F.2d at 500-01. It should go without saying that "[i]t is far easier

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[4] 40 C.F.R. § 1501.2 further provides that agencies "shall integrate the NEPA process with other planning at the earliest possible time to insure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." Regarding the timing of preparing an EIS, the regulations provide that §[t]he statement shall be prepared early enough so that it can serve practically as an important contribution to the decision-making process and will not be used to rationalize or justify decisions already made. . . . " 40 C.F.R. § 1502.5. These regulations are entitled to "substantial deference." *Marsh*, 490 U.S. at 372.

to influence an initial choice than to change a mind already made up." *Id.* at 500 (quoting *Commonwealth of Massachusetts v. Watt*, 716 F.2d 946, 952 (1st Cir. 1983)). *See also Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988) ("The rationale behind [the rule requiring federal agencies to integrate NEPA process at the earliest possible time] is that inflexibility may occur if delay in preparing an EIS is allowed: after major investment of both time and money, it is likely that more environmental harm will be tolerated.") (citations omitted). Thus, because it is plainly preferable, if not required by law, that the EIS be prepared before commitment of resources for any length of time, and because rescission of the contracts would return the situation to that which existed prior to renewal of the contracts allegedly in violation of NEPA, it is not true that plaintiffs could not achieve "any effective relief" by way of their NEPA claim. Moreover, as in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), the possibility remains that the relief sought by plaintiffs through this action may vary, for instance, by the required time for completion of the EIS, and therefore be more advantageous than that envisioned by the CVP Improvement Act. Thus, this court cannot conclude that plaintiffs' NEPA claim is moot.

2. **ESA Claim**

Plaintiffs' ESA claim alleges violations based on two theories: (1) a procedural violation, i.e., whether the defendants properly negotiated and renewed contracts and only thereafter prepared a biological opinion; and (2) a substantive violation, i.e., whether the section 7 consultation and biological opinion prepared were inadequate.

Defendants move to dismiss plaintiffs' ESA claim as moot arguing that federal defendants have completed an ESA consultation under section 7. Moreover, they argue, to the extent the CVP Improvement Act requires the Secretary to complete all appropriate environmental studies prior to executing new long-term renewal contracts, – including studies equivalent to ESA studies, the ESA claim is moot because any potential relief has already been ordered by Congress. Alternatively, they assert that the question as to what consultation may be required to comply with the CVP Improvement Act is premature.

Section 3406 of the CVP Improvement Act, the only section explicitly mentioning ESA provides:

> FISH AND WILDLIFE RESTORATION ACTIVITIES. – The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Special Act, 16 U.S.C. § 1531, *et seq.* . . .

CVP Improvement Act § 3406(b).

As plaintiffs point out, this provision does not require the Secretary to prepare a new biological opinion as to the renewed contracts, but rather to generally comply with ESA. As with plaintiffs' NEPA claim above, defendants' failure to comply with ESA when executing the already renewed contracts may be grounds for rescission of those contracts, thus subjecting them to the three-year limitation pending environmental review. *See, e.g., Conner v. Burford*, 848 F.2d 1441, 1451-58 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988), *cert. denied*, 493

U.S. 873 (1989) (under ESA, agency's actions may be set aside if they were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law"). That the CVP Improvement Act specifically directs the Secretary to comply with ESA in operating the CVP is irrelevant to the question whether the already-renewed contracts are valid. Thus, the ESA claim, insofar as it alleges a procedural violation, is not moot.

Plaintiffs have not alleged that they have any dispute with future ESA consultations and studies conducted pursuant to the CVP improvement Act, nor could they, as such a claim would not be ripe. It does not follow, however, that the ESA claim plaintiff's have made is not ripe. Plaintiffs' ESA claim is premised upon alleged past violations of ESA – for the defendants' failure to properly comply with ESA's requirements prior to entering the renewal contracts.

Finally, in a footnote, federal defendants argue that plaintiffs' ESA claim based on the alleged preparation of an inadequate biological opinion should be dismissed because they failed to provide 60-days written notice as required by 16 U.S.C. § 1540(g)(2)(C).[5] *See* Fed. Defs.' Br.

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[5] 16 U.S. C. § 1540(g)(2)(C) is part of the citizen suit provisions of ESA. It provides in pertinent part: "No action may be commenced under subparagraph (1) (C) of this section prior to sixty days after written notice has been given to the Secretary. . . . " Subsection (1)(C) provides that a person may commence a civil suit on his own behalf "against the Secretary where there is alleged a failure of the Secretary to perform, any act or duty under section 1533 of this title which is not discretionary with the Secretary." Section 1533 generally relates to the determination of endangered species and threatened species.

in Supp. of Mot. to Dismiss Pls.' Compl. at 14 n.4 (filed 1/29/93). The 60-day notice provided by plaintiffs in November 1988 before the suit was filed is insufficient, they assert, to cover both of the ESA claims set out in the fourth amended complaint.

In Plaintiffs' Opposition to Federal And Non-Federal Defendants' Motion to Dismiss at 12 n.6 (filed 4/15/93), plaintiffs respond to defendants' footnoted argument asserting the 60-day notice should be interpreted flexibly. *See, e.g., Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 652 F. Supp. 620, 628 (D. Md. 1987); *Kitlutsisti v. Arco Alaska, Inc.*, 592 F. Supp. 832, 842 (D. Alaska 1984), *vacated on other grounds*, 782 F.2d 800 (9th Cir. 1986). The cases upon which plaintiffs rely appear to no longer be the law.

Failure to provide timely written notice pursuant to section 1540 is a jurisdictional defect. *Save the Yaak Committee*, 840 F.2d at 721. The purpose of the notice requirement is to provide agencies a 60-day nonadversarial period to achieve compliance. *Hallstrom v. Tillamook County*, 493 U.S. 20, 32 (1989).[6] Its requirements are strict and may not be varied on equitable grounds. *Id.* at 27. compliance may not be achieved by filing suit, providing notice to the agency and then staying the case for 60 days. *Id.* at 26.

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[6] Although *Hallstrom* involved the 60-day provision provided in the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. § 6972(b)(1), the Court noted that many environmental statutes, including ESA, have the same 60-day notice all derived from section 304 of the Clean Air Amendments of 1978, 42 U.S.C. § 7604. *Hallstrom*, 493 U.S. at 23 n.1. The Ninth Circuit treats the 60-day notice period in RCRA the same as ESA's. *Save the Yaak*, 840 F.2d at 721.

Plaintiffs' original complaint, filed December 21, 1988, did not contain an ESA claim. Their first amended complaint, filed February 6, 1989, contained an ESA claim and included as an exhibit their November 18, 1988 letter to the Secretary of the Interior stating their intent to sue. That letter indicated plaintiffs' contention that endangered species existed in the area affected by the renewal contracts and that full compliance with ESA was required prior to the execution of these contracts: "Notice is hereby given that if full compliance is not achieved, some or all of the above-mentioned organizations intend to file an action pursuant to 16 U.S.C. § 1540(g) and other applicable statutes." Plaintiffs' revised second amended complaint, filed February 4, 1992, contains a similar ESA claim.

Following the cross-motions for summary judgment filed May 19, 1992, in which plaintiffs also argued that the biological opinion finally conducted was inadequate, defendants filed a status report raising the issue that plaintiffs had moved in part on their ESA claim arguing that the completed biological opinion was inadequate, but that their complaint had never been amended to state such a claim. Plaintiffs were thus granted leave to file a third amended complaint. This complaint, filed June 17, 1992, alleges violations of ESA both for defendants' failure to conduct appropriate environmental review under ESA prior to contract renewal, and also that the October 15, 1991 biological opinion was inadequate. However, plaintiffs have not pointed to anything in the record indicating that they have notified defendants of their intention to file an ESA claim based on an inadequacy

theory. Under these circumstances, and following *Hallstrom*, several cases suggest that plaintiffs may not be able to proceed on the inadequacy theory of their ESA claim. *See Monongahela Power Co. v. Reilly*, 980 F. 2d 272, 275 n.2 (4th Cir. 1992). *But see Dagge v. City of Burlington*, 935 F.2d 1343 (2d Cir. 1991), *rev'd in part on other grounds*, 112 S. Ct. 2638 (1992); *Zands v. Nelson*, 779 F. Supp. 1254 (S.D. Cal. 1991). Arguably, plaintiffs may be able to demonstrate compliance with the notice provision. *See, e.g., Klickitat County v. Columbia River Gorge Comm'n*, 770 F. Supp. 1419, 1424 (E.D. Wash. 1991); *Birkenfeld Trust v. Bailey*, ___ F. Supp. ___, 1993 WL 275877 at 10 (E.D. Wash. May 27, 1993). Nevertheless, as the record now stands, this court is unable to make that determination or to risk putting this determination off indefinitely. *Cf. Hallstrom*, 493 U.S. at 32 (rejecting plaintiffs' plea not to dismiss the case on notice grounds because the case was a complex environmental case that had proceeded for four years and resulted in a determination on the merits).

Because this significant argument was raised by defendants in a footnote, however, the court concludes that further briefing on this issue is appropriate. Thus, not later than twenty (20) days from the effective date of this order, plaintiffs shall file with the court a memorandum setting forth their position on the issue of whether under the circumstances of this case, ESA's 60-day notice requirement is applicable to plaintiffs' inadequate biological opinion claim under ESA, and if they assert that they have in fact satisfied that requirement, shall provide the relevant evidence. Not later than twenty (20) days thereafter, defendants shall respond to plaintiffs'

memorandum and evidence, if any. The court will thereafter take the matter under submission without hearing.

III

VALIDATION OF THE RENEWAL CONTRACTS

Defendants argue that through the CVP Improvement Act, Congress implicitly affirmed or validated the renewal contracts and therefore, this court may not invalidate those contracts for failure to comply with NEPA or ESA. In support of this argument, defendants point to the several places in the CVP Improvement Act where Congress evidenced its understanding that several contracts had already been renewed and assumed their continued existence.[7] Because Congress enacted

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[7] Examples of provisions of the CVP Improvement Act dealing with existing contracts include section 3404 (c) (1) which provides: "With respect to all contracts renewed by the Secretary since January 1, 1988, the Secretary shall incorporate in said contracts a provision requiring payment of the charge mandated in subsection 3406(c) and subsection 3407(b) of this title and all other modifications needed to comply with existing law, including provisions of this title. This title shall be deemed 'applicable law' as that term is used in Article 14(c) of contracts renewed by the Secretary since January 1, 1988."

In mandating compliance with law in the renewal of contracts, section 3404 (c) (2) provides: "Upon renewal of any long-term repayment or water service contract . . . the Secretary shall incorporate all requirements imposed by existing law, including provisions of this title, within such renewed contracts. The Secretary shall also administer all existing, new and renewed contracts in conformance with the requirements and goals of this title."

In discussing contract provisions to encourage early renewal, section 3404(c)(3) provides: "Provided however, That

legislation affecting those contracts, defendants urge, Congress did not contemplate that they could be invalidated by this suit; that in fact, Congress' recognition of those contracts suggests it meant to affirm them.

It is not disputed that Congress has the authority to validate contracts which otherwise would be void. In *McNair v. Knott*, 302 U.S. 369, 372-73 (1937), the Court explained

> There is nothing novel or extraordinary in the passage of laws by the Federal Government and the States ratifying, confirming, validating, or curing defective contracts. Such statutes, usually designated as "remedial," "curative," or "enabling," merely remove legal obstacles and permit parties to carry out their contracts according to their own desires and intentions.

See also Swave & Hoyt v. United States, 300 U.S. 297, 301-02 (1937) (Congress may ratify actions which it might have otherwise authorized); 15 Williston on Contracts § 1758, *Effect of Illegal Performance Becoming Legal* ("It is within the power of a legislature to validate an existing contract made in violation of the law theretofore in force. . . .") and 6A Corbin on Contracts § 1532, *Effect of a Change in the Law, or other Subsequent Factors, Upon an Illegal Bargain – Ratification* (while mere repeal of prohibitory statute does not validate a contract contemplating such a prohibited act, where statute expressly or impliedly ratifies contracts, contract is validated).

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this paragraph shall not apply to contracts renewed after January 1, 1988, and prior to the date of enactment of this title. . . .

The parties do not identify, nor has this court's independent research uncovered, cases which provide standards for determining when an act of Congress validates an otherwise illegal contract. Examples gleaned from case law, however, suggest that the validation must be relatively explicit.

In *Portland Audubon Soc. v. Hodel*, 866 F.2d 302 (9th Cir.), *cert. denied*, 492 U.S. 911 (1989), environmental groups sought to enjoin harvesting and sale of old-growth forests as a violation of NEPA and other statutes. In response to the litigation, Congress included in a continuing budget resolution language that, in essence, barred federal courts from hearing several of plaintiffs' claims.[8]

The Ninth Circuit explained that

> The statute merely precludes judicial review when the only basis upon which the plaintiffs seek review is that the plan did not incorporate newly discovered information . . . not available to the BLM when the plan was adopted.

Id. at 307. The court concluded that because the statute did not exclude challenges to timber sales, the statute did not amount to an implied repeal of those environmental laws otherwise applicable to this project.

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[8] The statute provided in relevant part: "There shall be no [judicial] challenges to any existing plan on the sole basis that the plan in its entirely is outdated, or in the case of the Bureau of Land Management, solely on the basis that the plan does not incorporate information available subsequent to the completion of the existing plan: *Provided further,* That any and all particular activities to be carried out under existing plans may nevertheless be challenged.

Other examples of court's review of Congress' attempt to ratify a federal agency's actions have similarly required specificity. In *EEOC v. Westinghouse Elec. Corp.*, 765 F. 2d 389 (3d Cir. 1985), the EEOC brought an action against a private employer which defended on the grounds that under a reorganization plan the EEOC lacked authority to bring such a suit. Pending appeal, Congress passed a statute retroactively ratifying the EEOC's actions.[9] Given the specificity of the statute, the Third Circuit had no difficulty concluding that Congress intended the statute to ratify EEOC's actions. *Id.* at 391.

Congress is clearly aware of how to validate otherwise invalid contracts, *see, e.g., Utter v. Franklin*, 172 U.S. 416, 422 (1899); *Seese v. Bethlehem Steel Co.*, 168 F.2d 58, 64 (4th Cir. 1948); *Cleveland-Cliffs Iron v. Chicago & N.W. Transp. Co.*, 581 F. Supp. 1144, 1151 (W.D. Mich. 1984). *See also West Side Belt Railroad Co. v. Pittsburgh Construction Co.*, 219 U.S. 92, 100 (1911) (state statute providing that certain contracts previously entered by foreign corporations are valid and binding). Moreover, Congress is certainly aware of how to carve out exceptions to federal environmental laws. *See Stop H-3 Ass'n*, 870 F.2d at 1430.

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[9] The statute provided: "Section 1. The Congress hereby ratifies and affirms as law each reorganization plan that has, prior the date of enactment of this Act, been implemented pursuant to the provisions of chapter 9 of Title 5, United States Code. . . . section 2. Any action taken prior to the date of enactment of this Act pursuant to a reorganization plan that is ratified and affirmed by section 1 shall be considered to have been taken pursuant to a reorganization expressly approved by Act of Congress." *Id.* at 391 (citing Pub. L. No. 98-532, 98 Stat. 2705 (1984)).

Here, while the plain terms of the CVP Improvement Act demonstrate that Congress knew renewal contracts existed, no provisions mandate that they remain in effect or affirm these contracts. Clearly, Congress could have, but did not, specifically provide that notwithstanding NEPA, ESA or other statutes, those contracts previously entered into are to remain in full force and effect so long as they are in compliance with the CVP Improvement Act. Because it would do no violence to the CVP Improvement Act, nor render any of its language surplusage to rule these contracts invalid, the Act's provisions relating to these contracts may be construed as merely establishing a procedure for dealing with these contracts if, and only if, they are not invalidated.

Defendants' argument falters for yet another reason. A necessary consequence of their contention is that Congress meant to affirm these contracts regardless of whether they were entered into in violation of other environmental statutes. Put another way, the defendants are contending that the CVP Improvement Act renders NEPA and ESA inapplicable to these contracts. Standard rules of statutory construction, however, counsel against such a repeal by implication. It is fundamental that "[r]epeals by implication . . . are not favored." *In re Glacier Bay*, 944 F.2d 577, 581 (9th Cir. 1991). Two general categories of repeal by implication exist:

> (1) where provisions in the two acts are in irreconcilable conflict, the later act to the extent of the conflict constitutes an implied repeal of the earlier one; and (2) where the later act covers the whole subject of the earlier one and is

> clearly intended as a substitute, it will operate as a repeal of the earlier act.

Id. (quoting *Radzanower v. Touche Ross & Co.*, 426 U.S. 148, 154 (1976)). In each of these circumstancest the intent of the legislature to repeal must be "clear and manifest." *Id. See also TVA v. Hill*, 437 U.S. 153, 189-93 (1978) (Congress' continuing appropriations for dam did not implicitly create exception to ESA – nothing in TVA appropriations demonstrates intent to repeal ESA)

There is nothing in the CVP Improvement Act which suggests that Congress meant to weaken any of its broader environmental statutes. Indeed, the CVP Improvement Act refers several times to the "requirements imposed by existing law," *see, e.g.*, section 3404(c)(2), thereby acknowledging the continued viability of those statutes as they apply to the projects regulated under the Act. Under these circumstances, it cannot be said that in enacting the CVP Improvement Act, Congress intended to repeal by implication the environmental statutes at issue in this case as they apply to the CVP.

While it may be argued that in ruling that the CVP Improvement Act did not ratify or affirm these previously renewed contracts, the Court is implicitly modifying the language of the CVP Improvement Act referring to "all contracts renewed by the Secretary since January 1, 1988" to refer to all "valid contracts," such a reading does no violence to the statute. Contracts are presumed to be legal and enforceable, *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977) (citing 6A Corbin, *Contracts* §§ 1499, 1533 (1962)) and nothing suggests that Congress intentionally

omitted words connoting validity. Simply put, an interpretation that the word contract as used in the Act imports notions of validity is consonant with Congress' expressed intent to mandate compliance with existing environmental statutes when renewing long-term water contracts.

Thus, absent more specific direction from Congress, I cannot conclude that the CVP Improvement Act explicitly or implicitly affirmed these contracts regardless of whether they were entered into in violation of other federal environmental statutes.

IV

SECTION 8/SECTION 5937

Defendants next argue that the CVP Improvement Act preempts plaintiffs' claim under Section 8 of the Reclamation Act of 1902[10] insofar as it mandates

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[10] Section 8 provides: "Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis the measure and limit of the right." 43 U.S.C. § 383 (up until "Provided"), § 372 (following "Provided").

compliance with Cal. Fish & Game Code § 5937.[11] Because specific provisions of the CVP Improvement Act require the Secretary to prepare a comprehensive plan to address fishery issues in the San Joaquin River, yet limit his authority to release water from the Friant Dam in furtherance of the Act, defendants argue that plaintiffs' section 5937 claim is preempted[12] insofar as it seeks release of water from Friant Dam to re-establish flows in the San Joaquin River for fish.[13] Defendants note that the CVP Improvement Act mandates payment by water users of a surcharge as a substitute for instream flows and argue that requiring a release pursuant to section 5937 to

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[11] Cal. Fish & Game Code § 5937 provides: "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

[12] A more appropriate characterization of the issue is whether previous federal law has been displaced. As I explain *infra*, however, that issue is resolved by application of conventional preemption principles.

[13] As stated earlier, plaintiffs' fourth request for relief contained in its Fourth Amended Complaint seeks "[p]reliminary and injunctive relief requiring the Bureau to comply fully with Section 8, Section 5937 and the APA by allowing sufficient water to pass over, around or through the Dam to keep in good condition fish life before Friant Dam."

establish these flows at this time would be inconsistent with Congress I intention that the flow would not be resumed for several years.

Plaintiffs and amicus California State Water Resources Control Board argue that the CVP Improvement Act section prohibiting the Secretary from making releases for the re-establishment of fish below Friant Dam pursuant to section 5937 pending a further act of Congress is limited to releases made "as a measure to implement this title." Moreover, they argue, throughout the CVP Improvement Act, Congress mandates compliance with state law and amends the goals of the Reclamation Act to include the preservation and establishment of fish and wildlife, which are the same goals as section 5937.

Section 3406, titled "Fish, Wildlife and Habitat Restoration" establishes goals and a plan for developing and protecting fish and wildlife in relation to the CVP generally and in regard to the Friant Dam specifically.[14]

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[14] Section 3406(b) provides: "Fish and Wildlife Restoration Activities. – The secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act, 16 U.S.C. § 1531, *et seg.*, and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project. The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and direct to:

"(1) develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels

Subsection (c) of section 3406 specifically provides a means for re-establishing fish and wildlife in the San Joaquin River between Friant Dam and the Mendota Pool.[15] The issue tendered is whether these statutes pre-empt application of California law.

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attained during the period of 1967-1991; *Provided*, That this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c) of this title. . . . "

[15] Section 3406 provides: "San Joaquin and Stanislaus Rivers. – The Secretary shall, by not later than September 30, 1996: (1) develop a comprehensive plan, which is reasonable, prudent and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento San Joaquin Delta Estuary. Such plan shall be developed in cooperation with the California Department of Fish and Game and in coordination with the San Joaquin River Management Program under development by the State of California; shall comply with and contain any documents required by the National Environmental Policy Act and contain findings setting forth the basis for the Secretary's decision to adopt and implement the plan as well as recommendations concerning the need for subsequent congressional action, if any; and shall incorporate, among other relevant factors, the potential contributions of tributary streams as well as the alternatives to the investigated under paragraph (2) of this subsection. During the time that the Secretary is developing the plan provided for in this subsection, and until such time as the Congress has authorized the Secretary to implement such plan, with or without modifications, *the Secretary shall not, as a measure to implement this title, make releases and for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases*

Although the parties each focus on preemption analysis, each assumes a preliminary issue which must be examined first. Plaintiffs' section 8 claim asserts that the Bureau, as owner of the Friant Dam, has violated the APA in failing to comply with Cal. Fish & Game Code § 5937. When Congress passed the CVP Improvement Act, it provided that the new Act "shall amend and supplement the Act of June 17, 1902, and Acts supplementary thereto and amendatory thereof." CVP Improvement Act § 3408(g). Section 8, of course, is part of that 1902 Act. There is no indication, however, that the CVP Improvement Act was intended to alter section 8 analysis. Nevertheless because Section 8 has been interpreted to mandate federal compliance with state water law so long as the conditions imposed are consistent with congressional directives, *California v. United States*, 438 U.S. 645, 679 (1978); *see also United States v. State of Cal., State Water Resources*, 694 F.2d 1171, 1182 (9th Cir. 1982); *NRDC*, 791 F. Supp. at 1435, the provisions of CVP Improvement Act § 3406 relating to releases of water for fish at Friant Dam

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as a measure to implement this title without a specific Act of Congress authorizing such releases. In lieu of such requirement, and until such time as flows of sufficient quantity, quality and timing are provided at and below Gravelly Ford to meet the anadromous fishery needs identified pursuant to such plan, if any, entities who receive water from the Friant Division of the Central Valley Project shall be assessed, in addition to all other applicable charges, a $4 per acre-foot surcharge for all Project water delivered on or before September 30, 1997; a $5 per acre-foot surcharge for all Project water delivered after September 30, 1997 but on or before September 30, 1999; and a $7 per acre-foot surcharge for all Project water delivered thereafter, to be covered into the Restoration Fund." Section 3406(c) (emphasis added).

must be examined to determine whether the application of section 5937 may now be considered consistent with congressional directives. Put another way, the question is whether the new statute alters the relationship of state law to federal law heretofore understood as requiring federal compliance with state law as a matter of federal law. To make this determination, the court may apply preemption principles. *State Water Resources*, 694 F.2d at 1176 ("The question before us, therefore, is whether state law, otherwise applicable by virtue of section 8, is displaced by subsequent congressional action. The analysis undertaken by the district court, consistent with settled preemption principles, was therefore appropriate.").

There are three types of preemption. *Gade v. National Solid Wastes*, 112 S. Ct. 2374, 2383 (1992). *See also English v. General Electric Co.*, 496 U.S. 72, 78 (1990). First, "Congress can define explicitly the extent to which its enactments pre-empt state law." *English*, 496 U.S. at 78. "Second, in the absence of explicit statutory language, state law is pre-empted where it regulates conduct in a field that Congress intended the Federal Government to occupy exclusively." *Id.* at 79. This preemption theory will not be applied when it involves areas that have "been traditionally occupied by the States" unless the congressional intent to supersede state law is "clear and manifest." *Id.* (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977)). Third, "state law is preempted to the extent that it actually conflicts with federal law." *Id.* Included in this category are statutes which make it "impossible for a private party to comply with both state and federal requirements" or "where state law stands as an obstacle to the accomplishment and execution of the full purposes

and objectives of Congress." *Id.* (quoting *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) These categories are not "rigidly distinct." *Id.* at 79 n.5.

The "ultimate touchstone" in determining pre-emption is "the purpose of Congress." *Gade*, 112 S. Ct. at 2381-82. Intent is to be discerned from the statutory language, structure and purpose of the Act. *Id.* at 2382. *See also CSX Transportation v. Easterwood*, 113 S. Ct. 1732, 1737 (1993) ("Evidence of pre-emptive purpose is sought in the text and structure of the statute at issue"); *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992) (questions of preemption "begin with the language employed by Congress"). Thus, the "ultimate" task for a court in determining issues of preemption is "whether [the] state regulation is consistent with the structure and purpose of the statute as a whole." *Gade*, 112 S. Ct. at 2383.

There are no express preemption provisions in the CVP Improvement Act. Thus, I must examine whether Congress intended to occupy the field or whether it actually conflicts with state law.

A. Field Preemption

A presumption exists against finding preemption in areas traditionally governed by state law. *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941, 943 (9th Cir.), *cert. denied*, 113 S. Ct. 80 (1992). *See also CSX Transportation*, 113 S. Ct. at 1737 ("In the interest of avoiding unintended encroachment on the authority of the States, however, a court interpreting a federal statute pertaining to a subject traditionally governed by state law will be reluctant to find pre-emption. Thus, pre-emption will not

lie unless it is 'the clear and manifest purpose of Congress' ") (quoting *Rice v. Santa Fe Elevator Corp.*, 331-U.S. 218, 230 (1947)); *People of the Territory of Guam v. Villacrusis*, 992 F.2d 886, 887 (9th Cir. 1993), ("Congress" intent to 'supersede or exclude state action . . . is not lightly inferred. The intention to do so must definitely and clearly appear' ") (quoting *Kelly v. State of Washington, ex rel. Foss Co.*, 302 U.S. 1, 12 (1937)); *Chemical Specialties*, 958 F.2d at 943 ("Federal regulation of a field of commerce should not be deemed preemptive of state regulatory power in the absence of persuasive reasons – either that the nature of the regulated subject matter permits no other conclusion, or that the Congress has unmistakably so ordained") (quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142 (1963)).

Without doubt, control over the exploitation of water is an issue traditionally regulated by the states. *California v. FERC*, 495 U.S. 490, 497 (1990) (citing, inter alia, *California v. United States*, 438 U.S. 645, 653-63 (1978)). *See also State Water Resources*, 694 F.2d at 1176. Thus, Congress' intent to occupy the field must be "clear and manifest" to overcome this presumption. *Id.* Because any examination of the statute demonstrates an obligation on the part of federal officials to conform their conduct to state law, it is apparent that Congress has not evidenced a clear and manifest intent to occupy the field.

I began by noting that section 3406(a)(4) amends the purposes provision of the Central Valley Project Authorizations Act of August 26, 1937 to declare "(e) Nothing in this title shall affect the State's authority to condition water rights permits for the Central Valley Project." The term "Central Valley Project water" is defined as "all

water that is developed, diverted, stored, or delivered by the Secretary in accordance with the statutes authorizing the Central Valley Project and in accordance with the terms and conditions of water rights acquired pursuant to California law." Section 3403(f). The CVP Improvement Act's many specific references to the application of state law further contraindicates any intent to occupy the field. Thus, section 3406(b) specifically requires the Secretary to "operate the Central Valley Project to meet all obligations under State . . . law." Section 3406 (b)(2) further directs the Secretary to "help to meet such obligations as may be legally imposed upon the Central Valley Project under State . . . law following the date of enactment of this title." These provisions thus make it clear that in adopting the CVP Improvement Act, Congress did not intend generally to preempt state water law or to otherwise change the federal/state water partnership described in *United States v. California*, 438 U.S. 645 (1978).

B. Actual Conflict

Under actual conflict preemption theory, a statute is preempted when it is "impossible for a private party to comply with both state and federal requirements" or "where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *English*, 496 U.S. at 79. A conflict may be obvious from the terms of the relevant statutes, *see, e.g., State of Nevada v. Watkins*, 914 F.2d 1545, 1561 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 1105 (1991) (Nevada's law providing that "it is unlawful for any person or governmental entity to store high-level radioactive waste in

Nevada" preempted by Congress' direction to the Secretary of Energy to conduct appropriate nuclear dump site characterization at a Nevada site), or may turn on the way the two bodies of law actually interact. *See, e.g., International Paper Co. v. Ouellette*, 479 U.S. 481 (1987) (state common law nuisance claim preempted by Clean Water Act). With this thought in mind, I turn to an examination of the CVP Improvement Act and section 5937.

The goals of both statutes are similar, i.e., each seek to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley, *compare* CVP Improvement Act § 3402 and Cal. Fish & Game Code § 5937. In determining whether state law "stands as an obstacle" to the full implementation of a federal law, however, a court must look beyond the ultimate goals of both the federal and state law. *Gade*, 112 S. Ct. at 2385. "A state law . . . is preempted if it interferes with the methods by which the federal statute was designed to reach that goal." *Id.* (quoting *International Paper Co.*, 479 U.S. at 494). The proper approach to questions of actual conflict is to attempt to "reconcile the operation of both statutory schemes with one another rather than holding that one has been completely ousted." *Chemical Specialties*, 958 F.2d at 949 (quoting *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 183 (1978)). *See also Wisconsin Public Intervenor v. Mortier*, 111 S. Ct. 2476f 2483 (199-1) (federal law should be narrowly construed to save state laws). *Cf. Hellon & Associates, Inc. v. Phoenix Resort Corp.*, 958 F.2d 295, 297 (9th Cir. 1992) ("to the extent that statutes can be harmonized, they should be").

Defendants make a strong argument that the provisions of CVP Improvement Act § 3406(c) contemplate a methodical, careful approach to the re-establishment of fish and wildlife below the Friant Dam. Arguably, an order of this court mandating compliance with section 5937 would contravene this methodical approach.

Nevertheless, it seems clear that the two statutes may be reconciled; i.e., that compliance with both the CVP Improvement Act and section 5937 is not only possible, but required.

Section 8, as amended and supplemented by the CVP Improvement Act, mandates federal compliance with state water law so long as the conditions imposed are consistent with Congressional directives. In *NRDC v. Patterson*, 791 F. Supp. 1425 (E.D. Cal. 1992), this court concluded that section 8 mandated compliance with California's Fish & Game Code § 5937. I conclude that the new statute in no way affects that determination.

CVP Improvement Act § 3406(c) prohibits the Secretary from releasing water for the restoration of flows from the Friant Dam without approval from Congress "as a measure to implement this title." The plain meaning of the statute is that the restriction only applies to those releases required under the CVP Improvement Act. By implication, therefore, other releases, such as those mandated by section 5937, are permitted. *See Estate of Reynolds v. Martin*, 985 F.2d 470, 473 (9th Cir. 1993) (phrase "except as otherwise specifically provided" in the 1991 Civil Rights Act necessarily implies that exceptions to the general rule are provided in the statute).

Such a construction is the only way to ensure that meaning is given to every word of the statute. It is well established that in construing a statute, a court is to interpret it such that every word is given some operative effect. *NRDC*, 791 F. Supp. at 1431 (citing *United States v. Nordic Village*, 112 S. Ct. 1011, 1015 (1992)). *See also Estate of Reynolds*, 985 F.2d at 473. Had this phrase been omitted, the CVP Improvement Act might well be construed as preempting section 5937; however, it was included in the statute and must be given effect. *See Moralest*, 112 S. Ct. at 2037 (*noting that* petitioner's limited preemption argument improperly reads out certain words of the statute).

While defendants have suggested no reasonable alternative to the interpretation of this phrase, they argue that plaintiffs' proposed construction of the language "as a measure to implement this title" to have no effect on the release of water for other purposes ignores the subsequent sentence establishing an assessment to be paid "in lieu of such requirement."[16]

The language "as a measure to implement this title" may not be read in isolation, of course, but must be read in the context of the surrounding provisions. *Smith v. United States*, 113 S. Ct. 2050, 2056, (1993) ("[j]ust as a single word cannot be read in isolation, nor can a single

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[16] "In lieu of such requirement, and until such time as flows of sufficient quantity, quality and timing are provided at and below Gravelly Ford to meet the anadromous fishery needs identified pursuant to such plan, if any, entities who receive water from the Friant Division of the Central Valley Project shall be assessed [a stated amount of money to be devoted to the Restoration Fund]." CVP Improvement Act § 3406(c).

provision of a statute"); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987) ("[i]n expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy"). While "in lieu of such requirement" certainly connotes Congress' understanding that the assessments are to be used in place of something, the question is what, and whether it must mean they are to be used in place of a release of water which would otherwise by required by state law. I conclude that a proper understanding of the structure and purpose of the new statute precludes such a reading. Rather, viewing the CVP Improvement Act as a statute imposing Federal obligations on the Bureau's operations, as opposed to those state obligations imposed by state law and section 8, the fee provision may be harmonized with releases required under section 8. I turn to an explanation of that conclusion.

In enacting the CVP Improvement Act, Congress explicitly amended the purpose provision of the Central Valley Project Authorizations Act of 1937 to declare that a further purpose of the project is the "mitigation, protection, and restoration of fish and wildlife." CVP Improvement Act § 3406(a)(1), amending 50 Stat. 850. As a means of furthering this newly stated policy, the Act imposed on the Secretary a wide variety of obligations. CVP Improvement Act § 3406(b)-(h), including subpart (c), the provision at issue here. While taken together these provisions may be viewed as the creation of a federal standard for CVP operations, nothing compels the view that this standard replaces applicable state standards since under the statute the Secretary is obligated to conform his conduct

to state standards. *See* CVP Improvement Act § 3406(b) ("immediately upon the enactment of this title, [the Secretary] shall operate the Central Valley Project to meet all obligations under State . . . law."). Given this structure, it would appear that the assessments imposed by section 3406 are imposed in lieu of releases which would otherwise be required by the new federal standards. Under this interpretation, the users obtain a modest benefit; namely, they will not have to surrender some water to satisfy the new federal standards imposed by the CVP Improvement Act. Under such a construction, the assessment provision would have no effect upon those requirements imposed by state law through section 8.[17]

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[17] This interpretation finds support in the legislative history. In the Senate floor debates, Senator Wallop of Wyoming asked Senator Johnston whether the CVP Improvement Act would interfere with California's efforts to implement a long-range water policy:

"Mr. WALLOP. Mr. President, I rise to obtain a clarification from the chairman of the committee.

The State of California, through the implementation of its long-range water policy framework, has begun significant actions in the past year which are designed, through consensus, to improve the availability of water for all major sectors of California – urban, agriculture and the environment. These develop solutions to Sacramento – San Joaquin Delta problems, and the transfer of the CVP to the State. How does the CVP Improvement Act affect these efforts?

"Mr. JOHNSTON. There is nothing in the CVP Improvement Act that would hinder these actions. The obligations of the act are designed to complement – not to interfere with, – California's efforts to further develop and coordinate its water policy."

138 Cong. Rec. S17661 (October 8, 1992).

This interpretation does no violence to CVP Improvement Act § 3408(g), which provides that "[t]his title shall amend and supplement" the 1902 Reclamation Act, which Act includes section 8. The entire CVP Improvement Act is considered Title 34 of the larger Reclamation Projects Authorization and Adjustment Act of 1992. Section 3408 (g), however, refers to "this title" as the CVP Improvement Act. Thus, it is relatively clear that CVP Improvement Act § 3406(c)'s phrase "as a measure to implement this title" refers solely to the CVP Improvement Act, and does not affect the potential release of water pursuant to section 8.

Similarly, this court must reject defendants' argument that such an interpretation would give no effect to the CVP Improvement Act's requirement that the Secretary develop a "comprehensive plan" to address fish, wildlife, and habitat concerns below the Friant Dam. This federal requirement need not preclude application of a state requirement or stand as an obstacle to development of such a plan. Rather, the Secretary's comprehensive plan may be premised upon the Bureau's compliance with section 5937.

Close examination of defendants' interpretation of the Act demonstrates that their construction would result in an internal inconsistency. If, as defendants argue, the Secretary is absolutely barred from releasing water from Friant Dam without a specific act of Congress, the Friant unit enjoys an exemption to any other environmental law, including ESA, should the Secretary determine that release of the water is necessary to comply with that other law. Moreover, the Bureau would be precluded from complying with a decision or permit condition of

the State Water Resources Control Board that the Bureau release water from the Friant Dam either to comply with section 5937 or any other state requirement. Aside from violating the rule of construction against implied repeal, *In re Glacier Bay*, 944 F.2d at 581, such a reading conflicts with the terms of the Act, which mandate compliance with ESA and decisions by the State Water Resources Control Board. *See* CVP Improvement Act § 3406(b).

Each party submits legislative history supporting its interpretation of the CVP Improvement Act. This court must confess to a belief that both the terms and applicability of the plain meaning rule as explained by the United States Supreme Court appears in constant flux. Nevertheless, where the statutory language is clear it appears that there continues to be a stable body of doctrine, i.e., while "the plain meaning rule does not prohibit resort to legislative history," *Tello v. McMahon*, 677 F. Supp. 1436, 1441 (E.D. Cal. 1988) (citing *Watt v. Alaska*, 451 U.S. 259, 266 (1981)), such a review is limited to determining "whether there is [a] 'clearly expressed legislative intention' contrary to the plain language of the statute." *Id.* (quoting *INS v. Cardoza-Fonseca*, 480 U.S. 421, 432 n.12 (1987)). "Very strong evidence, if not explicit language, from the legislative history is necessary to overcome the plain meaning naturally to be drawn from the language of the statute." *Id.* (citing *In re Seidel*, 752 F.2d 1382, 1385 (9th Cir. 1985)). With these standards in mind, I turn to the various pieces of legislative history tendered by the parties. I conclude below that the material tendered provides little aid in resolution of the issue before the court.

Defendants indicate that an early version of the CVP Improvement Act specifically addressed section 5937, but that it was later deleted.[18] They contend that the exclusion of this provision suggests that Congress intended to exempt the CVP from compliance with section 5937 at this time. Defendants' suggestion is not well-taken, as a court is not to give decisive significance to the unexplained disappearance of language from an earlier bill. *Mead Corporation v. Tilley*, 490 U.S. 714, 723 (1989); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969). *See also Allen v. Lerner*, 485 F. Supp. 871, 877 (D.N.J. 1980).

Defendants attach particular significance to the remarks of Senator Wallop in arguing that the CVP Improvement Act prohibited all releases below Friant Dam until Congress specifically permitted it.[19] As

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[18] This earlier version provided: "In coordination with the Secretary of Commerce, State of California, appropriate Indian tribes, fisheries and conservation organizations, and the general public, the Secretary shall . . . (2) develop, adopt and implement a program to comply with the purposes and provisions of section 5937 of the Fish and Game Code of the State of California." Central Valley Improvement Act Hearings Before the Subcommittee on Water and Power of the Committee on Energy and Natural Resources, S. Rep. No. 484, 102d Cong., 1st Sess. 17 (1991).

[19] Senator Wallop stated that among the things the new law included was "permanent protection for the Friant water users against releases from Friant without a specific act of Congress." 138 Cong. Rec. S17658 (Oct. 8, 1992 daily ed.). Further, Senator Wallop stated that the requirement in section 3406(c) that the comprehensive plan be "prudent, reasonable and feasible" meant that such a plan precluded trying to reestablish flows below Friant. 138 Cong. Rec. § 7660 (Oct. 8, 1992 daily ed.).

plaintiffs point out, however, Senator Wallop's comments are less than conclusive in light of the discussion he had with Senator Johnston on the Senate floor regarding the continuing viability of section 8's expansive interpretation under *California v. United States*, 438 U.S. 645.[20]

Moreover, in an October 20, 1992 letter to the President, Senator Wallop wrote: "Friant Releases. Miller-Bradley required an open end study of restoration of anadromous fish runs on the San Joaquin. Friant contractors estimated that such a restoration would require 600,000 of the 800,000a f to be delivered to Friant. The Conference permanently prohibited the Secretary from making *any* releases from Friant ever, and given that limitation, required that the study be limited to what was as 'prudent, reasonable and feasible.' I want to emphasize this provision. If this legislation is enacted, there can never be any release from Friant for the purposes of the study on fish and wildlife restoration without specific Act of Congress." (Emphasis in original.)

Even assuming this post-passage description of the bill by one Senator may be given any weight, *see Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 n.3 (1982), a matter not clear to the court, it does not alter the court's analysis. As with the Act itself, Senator Wallop added a proviso to his statement that "there can never be any release"; he stated that there cannot be a release "for the purposes of the study on fish and wildlife restoration." This restorative purpose appears to be that adopted and pursued as a federal policy through the CVPIA; it does not necessarily restrict or affect any state policy as set forth in the Fish & Game Code or through an order of the State Water Resources Control Board.

[20] In discussing the CVPIA, the following colloquy took place:

"MR. WALLOP. Is there anything in the CVP Improvement Act that alters Congress' long standing deference to the States in determining reasonable and beneficial uses of water?

"MR. JOHNSTON. Nothing in this bill is intended to diminish or expand any authority that California presently has.

Under these circumstances, the Senator's comments cannot constitute "very strong evidence" which would justify departure from the statute's plain language.

In support of their position, plaintiffs refer to a March 29, 1993 letter from the CVP Improvement Act's authors, Senator Bradley and Representative Miller, to Interior Secretary Babbitt and Attorney General Reno in which the Senator and Representative sought to explain to the Justice Department that its position in this very litigation was contrary to legislative intent.[21] I can accord

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The States' authority remains unchanged consistent with the law as interpreted in *California v. United States*, 4[38] U.S. 645 (1978).

"MR. WALLOP. Some of the CVP Improvement Act's provisions put limits on what the Secretary of the Interior can do with regard to meeting his obligations under the act. Is there anything in the act that would similarly limit the State of California?

"MR. JOHNSTON. The limitations in the act with regard to CVP obligations are limitations on the specific requirements of the Secretary's responsibilities under the act. The State's authority remains unchanged consistent with the law as interpreted in *California v. United States*, 4[38] U.S. 645 (1978)" 138 Cong. Rec. § 17661 (Oct. 8, 1992 daily ed.).

Of course, this court interpreted section 8, in light of *California v. United States*, to mandate the Secretary's compliance with section 5937 as a state-imposed requirement. Since Congress is presumed to have known of this interpretation, *Lorillard*, 434 U.S. at 580-81, the Senators' discussion about the continuing authority of the state to impose conditions can hardly be characterized as clear evidence that Congress intended to reverse this court's order.

[21] This letter provided in pertinent part: "Far from supporting the position taken by the Justice Department attorneys, this section [3406(c)] reinforces the deference to state

little weight to this post-enactment letter in evaluating the legislative intent of Congress. *See Bread Political Action Committee v. FEC*, 455 U.S. 577, 582 n.3 (1982) (post-hoc observations by individual senators entitled to little weight); *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1457 (9th Cir. 1992). Neither do the President's statement when signing the CVP Improvement Act[22] nor

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laws that is present throughout the reclamation laws. This section states in two places that the Secretary shall not make releases 'as a measure to implement this title.' This language, which appears virtually nowhere else in the Act, can have no other meaning except the obvious one: that the Secretary may make releases pursuant to other laws or contracts. Therefore, if some other law, such as Section 5937, requires the Secretary to release water, this Act does not prohibit him from making such releases.

"The Justice Department's position ignores the plain meaning of the proviso 'as a measure to implement this title' and attempts to render it completely meaningless. Yet, this unwarranted interpretation would not only limit the Secretary's ability to comply with state laws such as section 5937 and the public trust doctrine, but could also limit his ability to release water pursuant to other federal laws such as the Endangered Species Act or the Clean Water Act, or to carry out other Reclamation contracts or priorities. This is not the effect Congress anticipated or intended when it passed P.L. 102-575."

[22] In his statement, President Bush expressed his considered deference to state water regulation: "I am concerned, however, that a number of provisions, if broadly construed, could violate the basic principle of Federal Western water policy – State primacy. A fundamental principle of my Western water policy is that the Federal Government must respect the primary role that individual States have in shaping and controlling their own policies regarding water use and allocation. An individual State is best positioned to assess its needs and to accommodate competing interests. Except in those

the Conference Report[23] provide any strong evidence that the plain language of the statute is contrary to Congress'

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instances where an overriding Federal interest or an interstate conflict is present, States should retain primacy in fashioning their policies regarding water. Accordingly, I am directing the Secretary of the Interior, in implementing this legislation, to ensure that is provisions are conducted with due deference to State primacy." Statement by President Bush upon signing H.R. Rep. No. 429, ___ Cong., 1st Sess., *reprinted* in 1992 U. S. Code Cong. & Ad. News 4054. He concluded stating that "Notwithstanding the concerns . . . on balance, these projects will better enable the citizens in our western States to manage one of their most precious resources."

Notwithstanding this stated deference, the President also stated that modifications made to the House bill "will ensure that the fish and wildlife objectives of the legislation can be met in a manner that maintains the viability of other important uses to which CVP water is now devoted." If the modifications referred to by the President include deletion of the section 5937 language, it could be argued that the President understood the bill to mandate the continuing water flows to the farmers served by the Friant Dam to the exclusion of fish and wildlife below the dam.

Even assuming this court should consider the President's statements as indicative of relevant legislative intent, *compare United States v. Tharp*, 892 F.2d 691, 694-95 (8th Cir. 1989) (President's intent in signing the law may be considered relevant in close questions of legislative intent) with *Estate of Reynolds v. Martin*, 985 F.2d 470, 477 n.8 (9th Cir. 1993) (providing little deference to the President's statement accompanying his signing of the bill), the statement provides less than conclusive support for either plaintiffs' or defendants' position.

[23] *See* Joint Explanatory Statement of the Committee of Conference at page 190 to the October 5, 1992 Conference Report to the Reclamation Projects Authorization and Adjustment Act of 1992, Report 102-1016, 102d Cong., 2d Sess.

intent. I conclude that the plain language of the statute governs.

In sum, considering the language and structure of the CVP Improvement Act and its purpose, the CVP Improvement Act and section 8, insofar as it incorporates section 5937, may be reconciled and that both statutory schemes may operate with one another rather than one being completely ousted. *Chemical Specialties*, 958 F.2d at 949. Accordingly, this court cannot conclude that plaintiffs' section 8/section 5937 claim is preempted. Because it is not preempted, application of section 5937 to the Bureau's operation of the Friant Dam cannot be deemed inconsistent with congressional directives, *State Water Resources*, 694 F.2d at 1176, and compliance with its mandate is compelled by Section 8. *California v. United States*, 438 U.S. at 679.

V

CONCLUSION

For all the above reasons, IT IS HEREBY ORDERED as follows:

1. Federal and non-federal defendants' motions to dismiss plaintiffs' fourth amended complaint are **DENIED**;

2. Not later than twenty (20) days from the effective date of this order, plaintiffs shall file with the court a memorandum setting forth their position on the issue of whether under the circumstances of this case, ESA's 60-day notice requirement is applicable to plaintiff's inadequate biological opinion claim under ESA, and if they

assert that they have in fact satisfied that requirement, shall provide the relevant evidence. Not later than twenty (20) days thereafter, defendants shall respond to plaintiffs' memorandum and evidence, if any. The court will thereafter take the matter under submission without hearing.

3. Not later than twenty (20) days from the effective date of this order, plaintiffs shall file with the court their supplemental brief relative to plaintiffs and defendants' cross-motions for summary judgment on the NEPA claim addressing the issues raised in the September 21, 1992 order. Defendants shall file their supplemental reply brief not later than twenty (20) days thereafter. Due to the delayed revival of these motions, plaintiffs and defendants should feel free to incorporate in their supplemental briefs an update to their arguments in support of and in opposition to the motions. Upon the filing of defendants' reply brief and without further order of the court, the December 14, 1992 stay on the NEPA claim will be vacated and plaintiffs and defendants' cross-motions for summary judgment on the NEPA claim will stand submitted.

4. A further status conference will be set by the court upon resolution of the issues pending before the court relative to the ESA and NEPA claims.

IT IS SO ORDERED.

DATED: October 7, 1993.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT
COURT

United States District Court
for the
Eastern District of California
October 12, 1993

* * CERTIFICATE OF SERVICE * *

2:88-CV-01658

Natural Resources de

V.

Houston

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on October 12, 1993, 1 SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Plaintiffs,

v.

ROGER PATTERSON, etc., et al.,

Defendants.

_____/

ORANGE COVE IRRIGATION DISTRICT, et al.,

Defendant-Intervenors.

_____/

NO. CIV. S-88-1658 LKK

ORDER

(Filed May 3, 1995)

This matter is before the court on cross-motions for summary judgment on plaintiffs' claims under the National Environmental Policy Act ("NEPA") and the Endangered Species Act ("ESA").

Plaintiff environmental organizations challenge the renewal of contracts between the federal Bureau of Reclamation ("Bureau" or "BOR") and 24 irrigation districts for the supply of water from the Friant Dam Unit of the Central Valley Project ("CVP"). The Friant Dam effectively diverts the entire flow of the San Joaquin River for agricultural irrigation use. The original Friant water service contracts were executed beginning in 1949, for 40-year terms. In June 1988, the government began negotiating a form long-term renewal contract with the water users. On November 2, 1988, the Bureau announced the

completion of negotiations with the Orange Cove Irrigation District. This was the first contract renewed.

Plaintiffs filed this action in December 1988. In April 1989, plaintiffs moved for a preliminary injunction against the negotiation and execution of further renewal contracts. The motion was denied, on the condition that all contracts contain a clause subjecting them to the final order in this case. Pursuant to continued negotiations, all contracts except Orange Cove also contain Article 14, which provides for limited future modifications based on environmental review by the federal defendants.

The complaint was amended to allege, inter alia, that the Bureau failed to comply with NEPA and ESA prior to execution of the disputed renewal contracts. Plaintiffs also claim that section 8 of the Reclamation Act of 1902 requires the Bureau to comply with California Fish & Game Code § 5937, which provides that dam owners shall permit sufficient flows to support fish below the dam. Cross-motions for summary judgment were filed in May 1992. Supplemental briefing and hearings regarding threshold NEPA issues took place in stages.

On October 30, 1992, after extensive litigation, but before the matter was submitted, the Central Valley Project Improvement Act ("CVPIA") was signed into law. The CVPIA reallocates a portion of federal reclamation water away from agricultural uses for environmental rehabilitation, and makes more water available to urban areas through water transfers. Under the CVPIA, contracts which expire must be renewed for three-year interim terms pending completion of environmental review. Subsequent long-term renewal requires prior

completion of programmatic environmental impact statements.

Because the new statute altered the parameters of renewal negotiations and addressed some of the environmental review issues presented by plaintiffs,[1] the substantive motions pending in this case were stayed. Plaintiffs filed a Fourth Amended Complaint on December 18, 1992, and defendants moved for dismissal in light of the CVPIA. By Order filed October 12, 1993, that motion was denied. The court ruled that the CVPIA did not preempt plaintiffs' claims regarding applicability of California Fish & Game Code § 5937, moot the NEPA or ESA claims as to contracts already signed, nor retroactively validate executed contracts. The October 12, 1993 Order revived the summary judgment motions as to NEPA and ESA, and requested supplemental briefing to update the parties' arguments.

Intervenors moved for certification of the section 5937 preemption issue for interlocutory appeal. That motion was denied at hearing on February 9, 1994. The court ruled from the bench that litigation of the section 5937 issue would remain stayed pending summary judgment on the NEPA and ESA claims, at which time those matters could be jointly certified for interlocutory appeal. The NEPA and ESA claims were ordered submitted upon completion of previously scheduled briefing, which was then extended several times. I now address the substantive issues of NEPA and ESA compliance first tendered

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[1] The failure to prepare environmental impact statements pursuant to NEPA is a major focus of plaintiffs' suit. The CVPIA also mandates compliance with ESA in the operation of the CVP.

prior to enactment of the CVPIA. These claims have been limited to the contracts entered prior to enactment of the CVPIA. *See* Order filed October 12, 1993.

I.

NEPA CLAIMS

A. Background

The principal purpose of NEPA is to ensure that federal agencies consider the environmental consequences of their actions as part of their decision-making processes. 42 U.S.C. § 4332(2)(A),(B); *Weinberger v. Catholic Action of Hawaii*, 454 U.S. 139, 143 (1981); *Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). Accordingly, the statute requires an environmental impact statement ("EIS") as a prerequisite to all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

NEPA's requirements are procedural rather than substantive. *Trustees for Alaska v. Hodel*, 806 F.2d 1378, 1382 (9th Cir. 1986); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA does not mandate particular results). Where the statute applies, the first step in compliance is the preparation of an environmental assessment ("EA") regarding the proposed action. 40 C.F.R. § 1501.4; *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9th Cir. 1988). Upon a finding of no significant impact ("FONSI"), the agency may determine not to conduct a full EIS. Otherwise, the scope of the EIS is determined by the results of the EA and applicable regulations. *Id.; see generally* 40 C.F.R. §§ 1500-08. NEPA does

not constrain the agency's ultimate decision regarding its proposed action, but ensures that environmental consequences will be explored, made public, and considered in the decision-making process. *See Citizens for a Better Henderson v. Hodel*, 768 F.2d 1051, 1056 (9th Cir. 1985); *Robertson*, 490 U.S. at 349.

These procedural requirements only apply when a "major federal action" is contemplated by the agency. 42 U.S.C. § 4332(2)(C). The inquiry whether a major action exists is a threshold question of NEPA's applicability; the subsequent question whether that action significantly affects the quality of the environment, requiring an EIS, only arises (to then be answered pursuant to the EA process) upon an affirmative answer. *See Greenpeace Action v. Franklin*, 14 F.3d 1324, 1331 (9th Cir. 1992) (agency's factual inquiry regarding impact presumes applicability of NEPA as a prior matter of law).[2]

It is undisputed that federal defendants did not prepare a programmatic EIS for the Friant Unit prior to Friant-wide negotiations, or individual impact statements prior to negotiation and execution of individual renewal contracts. The Secretary took the position that NEPA did not apply to contract renewal, and that any

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[2] *See also Friends of the Payette v. Horseshoe Bend Hydroelectric Co.*, 988 F.2d 989, 992 (9th Cir. 1993) (court reviews FONSI determination where threshold existence of major federal action undisputed); *Found. for N. Am. Wild Sheep v. United States*, 681 F.2d 1172, 1177-78 (9th Cir. 1982) (same).

environmental implications would be adequately addressed by the San Joaquin River Basin Management Initiative.[3]

Defendants contend that NEPA does not apply to the renewal of the Friant water service contacts, because (1) such renewal is not discretionary agency action, (2) the contracts fall within one of NEPA's categorical exemptions, and (3) renewal does not alter the status quo and thus does not constitute "major federal action" subject to the statute.

B. Standard of Review

The standards governing review of an agency decision not to prepare an EIS depend on the grounds of that decision. It is an open question in this circuit whether a purely legal issue concerning the threshold applicability of NEPA is subject to the same standards as an agency decision not to prepare an EIS where NEPA applies. *See Greenpeace*, 14 F.3d at 1331 n.8. For the reasons explained below, I conclude that it is not.

When an agency determines pursuant to NEPA that its obligations have been satisfied without a full EIS, as

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[3] The Initiative was announced as a comprehensive review of the water-related environment of the San Joaquin River Basin. Both before and after the CVPIA, various environmental review and protection measures have been directed at related river, Delta, and Bay ecosystems. While both NEPA and ESA provide for incorporation of statutorily-required review in wider projects to avoid duplication of effort, the voluntary undertaking of related efforts does not obviate the need for NEPA or ESA compliance.

when an EA results in a FONSI, or that an initial EIS satisfies the statute and need not be supplemented, judicial review is guided by the "arbitrary and capricious" standard set forth in the Administrative Procedures Act ("APA"), 5 U.S.C. § 706(2)(A). *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 377 (1989) (decision not to supplement EIS); *Greenpeace*, 14 F.3d at 1330 (decision not to conduct initial EIS). This standard is appropriate for agency compliance determinations, which are fundamentally factual or technical in nature and involve the discretionary exercise of agency expertise. *Marsh*, 490 U.S. at 377; *Greenpeace*, 14 F.3d at 1330-31. When an agency's decision is based on its own expert review of environmental data, heightened deference is called for under the APA. *Id.* at 1331.

This rationale does not apply to purely legal questions regarding the threshold applicability of NEPA. For standard of review purposes, the important distinction is between legal and factual determinations. *Id.* Accordingly, the Ninth Circuit has not extended application of the "arbitrary and capricious" standard to legal challenges such as the determination whether "major federal action" exists. *Id.* at 1331 n.8.

Prior to *Marsh* and *Greenpeace*, all decisions not to prepare an EIS were reviewed in this circuit under a "reasonableness" standard. *See Sierra Club*, 843 F.2d at 1192. This standard governs review under 5 U.S.C. § 706(2)(D), which provides that agency action may be set aside if undertaken "without observance of procedure required by law." Even after *Marsh* and *Greenpeace*, this provision of the APA most directly applies to the agency

action challenged here. Review of an agency's determination that NEPA does not apply to its proposed action poses precisely the question whether the agency has proceeded without observance of legally required procedures. Accordingly, reasonableness analysis should apply. *See NRDC v. Duvall*, 777 F. Supp. 1533, 1536-37 (E.D. Cal. 1991).

Because the Ninth Circuit has not extended *Marsh* to threshold questions of NEPA applicability, I conclude that the previous rule still governs this type of agency determination. *See NRDC*, 777 F. Supp. at 1537 (reasonableness standard governs determinations which are not within the scope of *Marsh*).[4] The BOR's determination that contract renewal does not constitute "major federal action" must therefore be upheld unless unreasonable. *See Sierra Club*, 843 F.2d at 1192. In judging reasonableness, the court should not substitute its judgment for that of the agency if the decision was fully informed and well considered. *Id.*

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[4] I concluded in *NRDC v. Duvall* that an initial decision not to conduct an EIS, on the basis of a cursory FONSI, was subject to review under 5 U.S.C. § 706(2)(d) and the reasonableness standard. The interpretation of *Marsh* on which this decision rested was subsequently rejected by the Ninth Circuit in *Greenpeace*. Nonetheless, *Greenpeace* holds only that *Marsh* applies to agency determinations made on the basis of environmental review pursuant to NEPA. The pre-*Marsh* rule of reasonableness presumably remains in effect where it has not been replaced. I accordingly decline to extend *Marsh* beyond the mandate of *Greenpeace* and the logic of both the Ninth Circuit and the Supreme Court.

Defendants appeal to the principles of deference articulated in *Chevron USA v. NRDC*, 467 U.S. 837 (1984). *Chevron* does not apply to BOR's determination that contract renewal does not trigger NEPA's procedural requirements. Plaintiffs challenge the agency's conduct in proceeding without NEPA compliance, not its exercise of rulemaking pursuant to statutory authority. BOR is not the federal agency charged with interpreting NEPA, and its decision that NEPA does not apply to a specific proposed action is not a regulatory act entitled to deference under *Chevron* principles.

C. "Major Federal Action"

Defendants forward three arguments why Friant contract renewal is not a major federal action subject to NEPA: (1) renewal is not discretionary, (2) renewal falls within an established categorical exemption to NEPA's EIS requirement, and (3) renewal does not alter the relevant status quo. Prior to enactment of the CVPIA, these issues were separately and extensively briefed and argued. Before turning to the facts of the case before me, I now explain the principles governing threshold NEPA applicability and the analytical relationship between the three defenses.

NEPA's environmental review requirements apply to discretionary agency actions, and not to those actions which are mandatory or ministerial in nature. *See Forelaws on Board v. Johnson*, 743 F.2d 677, 681, 682-83 (9th Cir. 1984), *cert. denied*, 478 U.S. 1004 (1986) (holding that agency discretion to negotiate terms of mandated power contracts brings the contracts within the scope of NEPA).

Without discretion there is no decision-making process within which environmental concerns may be considered. Accordingly, the discretionary action rule is a logical corollary of the congressional mandate that agencies consider environmental consequences along with other factors in choosing a course of action. *See, e.g., Portland Audubon Soc'y v. Babbitt*, 998 F.2d 705, 709 (9th Cir. 1993) (NEPA applies to action authorized by other legislation, where agency retains discretion to make decisions regarding implementation). For that reason, the presence or absence of discretion goes to the question whether NEPA applies at all. *Id.*[5]

A distinct principle is that federal action which does not change the status quo does not constitute "major action" governed by NEPA. *Upper Snake River Chapter of Trout Unlimited v. Hodel*, 921 F.2d 232, 235 (9th Cir. 1990); *Nat'l Wildlife Fed'n v. Espy*, 45 F.3d 1337, 1344 (9th Cir. 1995). The Ninth Circuit has recently explained that status quo analysis is independent of the discretion issue. *Nat'l Wildlife*, 45 F.3d at 1344 (discretionary agency action that does not alter the status quo does not require an EIS).

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[5] In this case, the Bureau argues that it is compelled to renew the Friant contracts because the users have vested water rights, and that it lacks discretion regarding critical contract terms such as quantity and price. Accordingly, defendants contend that negotiation and execution of the renewal contracts is not discretionary, and that NEPA therefore does not apply.

This was the primary basis of Interior's determination that an EA and EIS were not required. (Tarr Opinion, AR 436-50.) The EPA referred the issue to the Council on Environmental Quality ("CEQ"), which concluded that the BOR had sufficient discretion to require NEPA compliance. (CEQ opinion, Ex. K to Fisher Decl.)

Ongoing projects and activities require NEPA procedures only when they undergo changes amounting in themselves to further "major action." *Snake River*, 921 F.2d at 234; *see also Westside Property Owners v. Schlesinger*, 597 F.2d 1214, 1223-24 (9th Cir. 1979).[6]

Unlike the discretion and status quo inquiries, the availability of categorical exclusions to the EIS requirement is not a matter of threshold NEPA applicability. For the reasons I now explain, these exemptions are properly understood as summary determinations of no impact rather than summary determinations of no major federal action. Accordingly, the availability of a categorical exclusion should be considered a compliance issue, and need only be addressed if the threshold standards for major action are independently satisfied.

The Council on Environmental Quality ("CEQ") has authorized individual federal agencies to identify those actions within their authority which may be categorically excluded from NEPA's I environmental review requirements. 40 C.F.R. § 1508.4 defines a categorical exclusion as

> [A] category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been

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[6] Defendants argue in essence that the disputed contracts maintain the status quo between the contracting parties and are therefore beyond the reach of NEPA. Plaintiffs counter that continued diversion of the river creates cumulative environmental degradation that alters the environmental status quo and therefore implicates NEPA. This dispute turns substantially on how the relevant status quo is defined. That question is addressed *infra*.

> found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations.

40 C.F.R. § 1508.4.

The BOR's list of categorical exclusions, adopted pursuant to this CEQ regulation, includes water service contracts that implement only administrative or financial practices or changes. (Department of Interior Manual, 516 DM, appendix 9.4(D)(14).) Federal Defendants rely on this exemption to support the validity of the Orange Cove contract in the absence of an EIS.[7] The questions whether the contract falls within the scope of this exemption, or is removed from the exclusion by BOR's own internal designation of actions generally requiring an EIS[8] and/or the CEQ's exceptions to categorical exclusions,[9] need only be reached if NEPA applies.

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[7] The exemption has only been officially invoked as to the Orange Cove contract. Regarding the subsequent contracts, BOR, while maintaining that NEPA does not apply, relies on its determination to "voluntarily" conduct a post-execution EIS. The adequacy of this strategy goes to compliance if NEPA applies.

[8] *See* Dept. of Interior Manual, 516 DM 6, appendix 9.3, (listing BOR actions which normally require an EIS, including water service contracts where NEPA compliance has not already been achieved). This policy guideline appears in Interior's Handbook for NEPA compliance. For the same reasons explained above regarding the categorical exclusions, these categorical inclusions go to the question whether an EIS should be prepared if NEPA applies, not whether a major federal action is present. Accordingly, plaintiffs' reliance on this provision cannot defeat defendants' status quo and discretion arguments.

[9] CEQ regulations provide that an otherwise excludable action will nonetheless trigger NEPA procedural requirements if it may have a significant environmental impact. 40 C.F.R.

40 C.F.R. § 1508.4 provides by its terms that categorical exclusions identify those actions which experience has shown do not require an EIS because they do not significantly affect the environment. In essence, then, the categorical exclusion is a categorical FONSI determination based on prior EAs.[10] This determination addresses what NEPA requires, assuming a major federal action. *See Greenpeace,* 14 F.3d at 1331. Accordingly, although the parties discuss the categorical exclusion as an issue of NEPA applicability, I conclude that it presents a subsequent compliance question.

As such, the issue only arises if the standards for major federal action are independently satisfied – that is, if the proposed agency action is both discretionary and alters the relevant status quo. If either prong fails, NEPA's procedural requirements are not triggered.

D. The Status Quo Exemption

The status quo rule emerges from principles originally developed to address NEPA's applicability to pre-NEPA projects. It is established that although the statute

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§ 1508.4. A categorical exclusion is accordingly not absolute, but may be overcome on the facts of a particular proposed major action.

[10] This presumption is rebuttable. *See* 40 C.F.R. 1508.4; Dept. Manual, 516 DM 2, appendix 2. Even though a certain type of action may generally have no impact, the regulatory scheme recognizes the possibility that a particular instance of such action may nonetheless meet the general definition of "a major federal action[ ] significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

is not retroactive, *Westside Property Owners*, 597 F.2d at 1223, where an ongoing project undergoes changes which themselves constitute "major federal action," the statutory requirements apply to those changes. *Snake River*, 921 F.2d at 234. On the other hand, mere continued operation of a facility does not require NEPA procedures. *Westside Property Owners*, 597 F.2d at 1217-18.[11]

CEQ regulations provide that NEPA applies to "new and continuing activities . . . [and] new or revised agency rules, regulations, plans, policies, or procedures." 40 C.F.R. § 1506.18(a) (1988). This regulatory definition, while entitled to deference as a matter of statutory interpretation,[12] has been construed by the Ninth Circuit to comport with the "further major action" rule. *Snake River*, 921 F.2d at 235 n.3 (explaining that 40 C.F.R. § 1506.18(a)

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[11] Where initial agency action pre-dates NEPA, only "further major actions" in pursuit of the project (rather than continued operation of existing facilities or continuation of certain resource uses) trigger the statute. *San Francisco Tomorrow v. Romney*, 472 F.2d 1021, 1024 (9th Cir. 1973). "Further major actions" include the actual construction of facilities and initial allocation of natural resources pursuant to a pre-NEPA plan, or changes to such allocation and use. *Port of Astoria v. Hodel*, 595 F.2d 467, 477 (9th Cir. 1979) (post-NEPA construction of power plant pursuant to pre-NEPA contract, at different location); *Environmental Defense Fund. Inc. v. Andrus*, 596 F.2d 848 (9th Cir. 1979) (post-NEPA execution of original water contracts pursuant to pre-NEPA plan); *SF Tomorrow*, 472 F.2d at 1025-26 (amendatory contract regarding federal funding for pre-NEPA development not a "further major action," but decision to change an industrial park into a neighborhood development program is).

[12] CEQ regulations are entitled to substantial deference. *Robertson*, 490 U.S. at 355-56.

contemplates the applicability of the EIS requirement to continuing activity only when continuation independently rises to the level of major federal action). *See also Andrus v. Sierra Club*, 442 U.S. 347, 363 n.21 (1979) (major federal action includes expansion or revision of ongoing programs). Accordingly, plaintiffs' characterization of water deliveries under renewed contracts as "continuing activity" does not obviate the need for status quo analysis.

When an agency decision merely perpetuates the existing use or allocation of resources, the statute is not implicated. *Burbank Anti-Noise Group v. Goldschmidt*, 623 F.2d 115, 116-17 (9th Cir. 1980) (per curiam), *cert. denied*, 450 U.S. 965 (1931) (change in ownership of airport not within scope of NEPA); *City & County of San Francisco v. United States*, 615 F.2d 498, 501 (lease of existing shipyard for same use not within statute); *Nat'l Wildlife*, 45 F.3d at 1343-44 (NEPA non-applicable to transfer of title involving continued use of wetlands for grazing).

These cases suggest that the relevant status quo is defined by the scope of human activity. In *Snake River*, plaintiffs challenged the Bureau's temporary reduction of water flows from the Palisades Dam. The court found that the disputed action was within the operational scope of an existing project and therefore not a change to the status quo. *Snake River*, 921 F.2d at 235. "In short, [defendants] are doing nothing new, nor more extensive, nor other than that contemplated when the project was first operational." *Id.* In the land use context, the status quo has been consistently defined in terms of the existing use. *See, e.g., Nat'l Wildlife*, 45 F.3d 1337 (grazing); *Committee for Auto Responsibility v. Solomon*, 603 F.2d 992 (D.C. Cir.

1979) (parking lot). The use of resources and scope of human enterprise have also measured the status quo where the disputed projects have implicated air and water quality as well as land use. *See, e.g. City & County of San Francisco*, 615 F.2d at 501 (shipyard); *Burbank Anti-Noise Group*, 623 F.2d at 116-17 (airport).

Here, it is undisputed that the renewal contracts maintain the status quo as to water service. Deliveries under the new contracts will be for the same quantities and accomplished by the same scope of Friant Unit operations as deliveries under the previous long-term contracts. Accordingly, renewal will maintain the status quo as to diversion of the San Joaquin River, the scope of agricultural irrigation, and the terms of the contractual relationship between the federal and non-federal defendants. In this sense, the disputed action accomplishes "nothing new, nor more extensive, nor other than that contemplated" when the original water service contracts were executed.[13]

If this court were writing on a blank slate, a different analysis might obtain. In my view, the commitment of water resources for a new 40-year period,[14] under environmental conditions necessarily changed over time and by the effects of prior action, cannot be said to merely

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[13] All original Friant water service contracts either contained renewal clauses or were amended to add them prior to expiration.

[14] Under the CVPIA, the renewal contracts executed for 40-year terms have been converted to 25-year terms, which is also the limit for prospective long-term contracts. The contracts at issue here contemplated 40-year terms when executed.

perpetuate existing circumstances. The original contracts both define the status quo as to water deliveries and oblige its continued performance for a specified period. Their expiration could thus be viewed as terminating the previous status quo by operation of law, and therefore subjecting subsequent contracts to NEPA review as "further major action."[15]

Indeed, this view informed the court's previously expressed opinion that the status quo issue might turn on disposition of the discretion question. This approach proceeds from the observation that where there is discretion in the fact or terms of contract renewal, the status quo need not be maintained and the status quo exemption therefore might not apply. As I now explain, the Ninth Circuit has now foreclosed such a theory.

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[15] Plaintiffs rely on two hydroelectric power cases which applied similar analysis. *See Forelaws on Board. Inc. v. Johnson*, 743 F.2d 677 (9th Cir. 1984), *cert. denied*, 478 U.S. 1004 (1986) (EIS required for execution of power delivery contracts); *Confederated Tribes & Bands of the Yakima Indian Nation v. FERC*, 746 F.2d 466 (9th Cir. 1984), *cert. denied*, 471 U.S. 1116 (1985) (NEPA applies to relicensing of hydroelectric plant). These cases are distinguishable from the case at bar, however. In *Forelaws*, the contracts involved the total reallocation of the relevant power supply. 743 F.2d at 681. The holding of *Confederated Tribes* was based on the terms of the Federal Power Act ("FPA"), which are not relevant here. 746 F.2d at 476. Accordingly, neither case supports the general proposition that renewal of a commitment to supply a resource must be construed as a new agency action. For the reasons I explain above, the Ninth Circuit's recent decision in *Nat'l Wildlife*, 45 F.3d at 1337, precludes such a general theory.

In *Nat'l Wildlife*, the court held that the discretionary transfer of title to sensitive wetlands did not inherently disrupt the relevant status quo, and that NEPA did not apply to the transfer because the use of the land would not change. *Nat'l Wildlife*, 45 F.3d at 1343-44. I am, of course, bound by this analysis. Accordingly, even if plaintiffs are correct that Friant Unit contract renewal or contract terms are discretionary, NEPA only applies if the particular exercise of discretion proposed by BOR changes the status quo as measured by the nature and scope of human activity under the contracts. It does not.[16]

Plaintiffs urge the court to measure the status quo according to ecological conditions, and tender exhaustive and persuasive evidence that the cumulative environmental effects of continued Friant diversion will not only perpetuate previous damage, but continue to cause escalating harm. However accurate this prediction as a matter of environmental science, and however forceful as a matter of policy, the rule of the circuit is that continued environmental degradation resulting from the same human use under different legal arrangements is not cognizable as a change to the status quo. *Nat'l Wildlife*, 45 F.3d at 1344.[17]

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[16] It is undisputed that the renewal contracts do not change the quantities of water to which the various irrigation districts are entitled, or the nature or scope of delivery services.

[17] To support their argument that NEPA encompasses cumulative environmental effects, plaintiffs cite cases involving the substantive standards for environmental review. *See Louisiana v. Lee*, 758 F.2d 1081 (5th Cir. 1985), *cert. denied*, 475 U.S. 1044 (1986); *Hanly v. Kleindienst*, 471 F.2d 823, 831 (2d Cir. 1972), *cert. denied*, 412 U.S. 907 (1973). These cases do not arise in the

The status quo doctrine, as it has evolved in this circuit, limits NEPA's procedural requirements to those federal actions which change not the environment or the legal arrangements under which human beings affect the environment, but the nature and scope of the human activity at issue. The disputed Friant contracts may well alter the environmental status quo, and certainly constitute a new contractual predicate for performance by the contracting parties. The contracts do not, however, alter the quantities of water provided to the districts nor the scope of delivery services. Accordingly, they do not change the relevant status quo under *Nat'l Wildlife*.

For these reasons, the federal defendants' determination that they were not required to pursue environmental review under NEPA cannot be deemed unreasonable. Defendants are therefore entitled to summary judgment on plaintiffs' claim that the pre-CVPIA contracts were executed without procedures required by NEPA. Because the status quo issue resolves the claim, I do not reach the question of discretion. *Nat'l Wildlife*, 45 F.3d at 1343-44.

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status quo context. Moreover, they cannot be adopted for such use because they involve the scope and substance of an EA or EIS, and do not pertain to the threshold determination whether a major federal action exists. Accordingly, plaintiffs' cumulative effects theory cannot overcome the outcome dictated by *Nat'l Wildlife*.

II.

ESA CLAIMS

A. Background

Prior to construction of the Friant Dam, the San Joaquin joined the Sacramento River at the Sacramento-San Joaquin Delta and flowed into the San Francisco Bay. The lack of releases from the Friant Dam therefore affects the entire river system. The flow of the San Joaquin itself now terminates at the Dam, and this in turn has required the export of Delta water through the Delta-Mendota Canal. The pumping and reverse flows associated with these water exports affect species outside the Friant service area. Affected aquatic species include the delta smelt, which the U.S. Fish & Wildlife Service ("FWS") has proposed listing as threatened, and the winter-run chinook salmon, which the National Marine Fisheries Service ("NMFS") has listed as threatened.[18] Many listed species of animals, birds, and plants inhabit the grasslands of the Friant Service Area.

The Endangered Species Act imposes on federal agencies a mandatory obligation to consider the environmental effects of projects that they authorize or fund, and

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[18] NMFS listed the winter-run chinook salmon (*Oncorhynchus tshawytscha*) as "threatened" under ESA's emergency provisions in August 1989, and the species was formally listed as "threatened" in November 1990. (Biological Opinion re CVP 1992 Operations, issued by NMFS on February 14, 1992, at 16.) The salmon is currently listed as endangered. 50 C.F.R. § 222.23(a). The winter-run chinook migrate through the Delta and spawn in the upper Sacramento River.

to carry out those projects without jeopardizing endangered species. As the Supreme Court stated in *Tennessee Valley Authority v. Hill* ("TVA"), 437 U.S. 153, 173 (1978):

> One would be hard pressed to find a statutory provision whose terms were any plainer than those of § 7 of the Endangered Species Act. Its very words affirmatively command all federal agencies "to *insure* that actions *authorized funded or carried out* by them do not jeopardize the continued existence" of an endangered species or "result in the destruction or adverse modification of habitat of such species." 16 U.S.C. § 1536. This language admits of no exception.

437 U.S. at 173 (emphasis in original).

Unlike NEPA, ESA thus has an explicit substantive goal which is served by its procedural requirements. *See Thomas v. Peterson*, 753 F.2d 754, 763 (9th Cir. 1985). In order to effectuate the substantive intent of Congress, the statute's procedural provisions are strictly enforced. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1384 (9th Cir. 1987); *Thomas*, 753 F.2d at 764.

Section 7(a)(2) of ESA requires the Secretary of the Interior and all federal agencies to insure that agency action is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction of critical habitats. 16 U.S.C. § 1536(a)(2). Section 7(b) implements this mandate by establishing a process of consultation between the agency proposing

action and the service with jurisdiction over the protected species.[19]

Formal consultation is required when the agency determines that its proposed action "may affect" an endangered or threatened species. *See Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 n.8 (9th Cir.), *cert. denied*, S. Ct., 63 U.S.L.W. 3769, 3771 (1995). As a product of this consultation, the FWS or NMFS issues a Biological Opinion evaluating the nature and extent of effect on the species. *See Sierra Club*, 816 F.2d at 1379. If the Biological Opinion concludes that the proposed action is likely to jeopardize a protected species, the agency must modify its proposal according to the service's suggestions or risk being found in violation of the statute. 16 U.S.C. 1536(b)(3)(a); *Tribal Village of Akutan v. Hodel*, 869 F.2d 1185, 1193 (9th Cir. 1988), *cert. denied*, 493 U.S. 873 (1989).

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[19] When the proposed action is a "major construction activity," a three step-process is involved. *See Thomas*, 753 F.2d at 763. First, the agency proposing action must consult with the service to see if any protected species "may be present" in the area of the proposed action. 16 U.S.C. § 1536(c)(1). If so, the agency must prepare a "biological assessment" to determine whether such species are likely to be affected. *Id.* If so, the agency must formally consult with the service, resulting in a Biological Opinion. 16 U.S.C. § 1536(a)(2).

Intermediate biological assessments are mandatory for construction projects and exemption applicants, and otherwise optional (an available tool for determining whether the action is likely to affect listed species – the standard for formal consultation and Biological Opinion). 50 C.F.R. § 402.12(b).

Section 7(d) forbids the "irreversible or irretrievable commitment of resources" during the consultation process.[20]

Plaintiffs allege that renewal of the Friant contracts violated ESA both procedurally and substantively. BOR initiated informal ESA consultation with FWS after the negotiation process had begun. Formal consultation followed, and a final Biological Opinion regarding the impact of the renewal contracts on threatened and endangered land-based species was completed on October 15, 1991. Ten renewal contracts had been executed prior to completion of the Biological Opinion. Formal consultation was never pursued with NMFS.

Plaintiffs' original ESA claim alleges that the contracts are invalid and must be rescinded because they were executed without full prior ESA compliance. By subsequent amendment, they also challenge the substantive adequacy of the section 7 consultation and 1991 Biological Opinion. Both theories are pleaded under the third claim of the Fourth Amended Complaint. I have previously determined to treat them as distinct claims. (Order filed October 12, 1993, at 13.) Accordingly, the

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[20] This provision only applies to consultation regarding species already listed as threatened or endangered by the FWS or NMFS. 16 U.S.C. § 1536(d) (governing consultations required by subsection (a)(2)). ESA consultation is also required regarding species which are proposed to be listed, 16 U.S.C. § 1536(a)(4), but the limitation on commitment of resources does not apply, 50 C.F.R. § 402.09.

procedural and substantive claims are addressed separately below.[21]

B. Standard of Review

Judicial review of administrative decisions involving ESA is governed by section 706 of the APA. *Pyramid Lake Paiute Tribe v. U.S. Dep't of Navy*, 393 F.2d 1410, 1414 (9th Cir. 1990). The reviewing court must satisfy itself that agency decisions are not "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The relevant inquiry is whether the agency "considered the relevant factor and articulated a rational connection between the facts found and the choice made." *Friends of Endangered Species Inc. v. Jantzen*, 760 F.2d 976, 982 (9th Cir. 1985) (quoting *Baltimore Gas & Elec. Co. v. NRDC*, 462 U.S. 87, 105 (1983)).

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[21] In their briefs, plaintiffs conflate their procedural and substantive challenges by arguing that defendants improperly executed the renewal contracts without having first completed consultation and obtained a Biological Opinion that addressed aquatic life and covers an adequate area of impact. The procedural question is whether the contracts entered prior to October 15, 1991, are subject to being set aside because executed prior to issuance of the FWS Biological Opinion. The substantive question is whether the contracts are subject to being set aside on the grounds that the Biological Opinion is inadequate, and its "no jeopardy" finding therefore unworthy of deference.

C. Procedural Violations

1. Failure to Complete FWS Consultation Prior to Contract Execution

Plaintiffs allege that the contracts entered prior to issuance of the 1991 Biological Opinion are invalid because the consultation process had not been completed. Here, I consider only whether the timing of execution constitutes a procedural violation of the statute.

Formal consultation, culminating in a Biological Opinion, is required under ESA when an agency determines, pursuant to its own mandatory review, that its action "may affect" critical species or habitat. 50 C.F.R. § 402.14(a). The FWS may also initiate the process itself if the Director is aware of proposed action that might affect a listed species. *Id.* Formal consultation is excused, inter alia, where optional informal consultation results in a determination by both agency and service that the action is not likely to adversely affect any listed species. 50 C.F.R. § 402.14(b). *See generally Pacific Rivers*, 30 F.3d at 1054.

BOR requested a species list from FWS for the Friant-Kern Area, in order to assess section 7 consultation needs for the renewal contracts on a Unit-wide basis, on April 13, 1988.[22] Extensive informal consulta-

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[22] The Orange Cove contract was the first Friant renewal contract to be executed. It was not preceded by formal section 7 consultation, but the BOR did informally consult with FWS and obtain its concurrence that no listed species was likely to be adversely affected. This matter is addressed separately below.

tion[23] continued through 1990 and 1991. A draft environmental assessment was issued by BOR on April 29, 1991, and supplemented on June 14, 1991. Formal consultation was requested on or about May 22, 1991.

The FWS issued a "no jeopardy" Biological Opinion on October 15, 1991.[24] Ten of the 28 Friant renewal contracts had been executed by that time. All but the Orange Cove contract contained Article 14, which provides for modification pursuant to environmental review. Plaintiffs argue that the execution of these contracts prior to completion of the consultation process violated ESA.

Non-federal defendants raise a threshold question. They contend that water contract renewal is not "agency action" subject to ESA. I cannot agree. The definition of agency action under ESA is quite broad. *See generally Village of False Pass v. Clark*, 733 F.2d 605, 611 (9th Cir. 1984); *Pacific Rivers*, 30 F.3d at 1054-55. The statute itself defines agency action as "*any action*, authorized, funded, or carried out by [a federal] agency." 16 U.S.C. § 1536(a)(2) (emphasis added). The Joint Regulations on

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[23] Informal consultation is defined as "all discussions, correspondence, etc., between the Service and the Federal agency . . . designed to assist the Federal agency in determining whether formal consultation or a conference is required." 50 C.F.R. § 402.13.

[24] The "no jeopardy" finding was contingent on compliance with a specified conservation plan. All environmental study pursuant to this consultation addressed land-based species exclusively. Plaintiffs' objections to the scope of the Opinion and the validity of its finding are properly considered as part of the substantive ESA claim.

ESA provide illustrative examples that include the granting of contracts. 50 C.F.R. § 402.02.[25]

Not only do ESA's procedural requirements apply to a broad range of agency actions, but the scope of the particular action subject to the statute's procedural requirements is also quite broad. The consultation and Biological Opinion requirement applies, for example, to the entire project initiated by a lease, encompassing both the initial sale and the future activity anticipated under the lease. *Conner v. Burford*, 848 F.2d 1441, 1453 (9th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989) (biological opinion must address leasing of oil and gas tracts and subsequent exploration and development); *North Slope Borough v. Andrus*, 642 F.2d 589, 608 (D.C. Cir. 1980) (same). Under *Conner*, the relevant agency action in this case includes execution of the Friant renewal contracts and water deliveries under those contracts.

The consultation process must be complete as to the entire project before the action is initiated or any of its

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[25] Defendants contend that only "major construction activities" are subject to ESA's consultation requirements. That contention is erroneous. The cited dicta in *Carson-Truckee Water Conservancy Dist. v. Clark*, 741 F.2d 257, 262 (9th Cir. 1984) does not purport to define or limit the types of activity which come within the statute. Furthermore, the existence of regulations specific to "major construction activities" does not limit the definition of "agency action" for purposes of consultation generally. *See* 50 C.F.R. § 402.02 (separately defining "agency action" and "major construction activities"); *see also Pacific Rivers*, 30 F.3d at 1054 n.8 (setting forth informal and formal consultation requirements applicable to actions which are not construction projects, such as programmatic documents).

components undertaken. *Conner*, 848 F.2d at 1453 (comprehensive biological opinion required before any leases could be sold); *Thomas*, 753 F.2d at 763 (failure to complete consultation prior to decision to build road violates ESA); *Lane County Audubon Soc'y v. Jamison*, 958 F.2d 290, 295 (9th Cir. 1992) (individual timber sales impermissible until consultation process complete regarding entire management plan). Accordingly, BOR was required to complete consultation and obtain a Biological Opinion as to the proposed renewal contracts and anticipated water deliveries under the contracts *before* the execution of any of them.

Defendants argue that Article 14, which permits amendments to the renewal contracts pursuant to the results of EIS and section 7 consultation, saves the contracts from this procedural violation. I cannot agree. The Ninth Circuit has flatly rejected such attempts to circumvent the prior consultation requirement by including stipulations for future modification into leases. *Conner*, 848 F.2d at 1455.[26]

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[26] The rejected Threatened and Endangered Species stipulations provided:

> "The Federal surface management agency is responsible for assuring that the leased land is examined prior to undertaking any surface-disturbing activities to determine effects upon any plant or animal species, listed or proposed for listing as endangered or threatened, or their habitats. The findings of this examination may result in some restrictions to the operator's plans or even disallow use and occupancy that would be in violation of the Endangered Species Act of 1973 by detrimentally

Defendants' reliance on *Friends of Endancrered Species v. Jantzen*, 760 F.2d 976, 983 (9th Cir. 1985), is misplaced.

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affecting endangered or threatened species or their habitats."

Conner, 848 F.2d at 1455.

Article 14, subsection (c) of the Friant renewal contracts provides:

> "(1) The Secretary has undertaken the San Joaquin River Basin Resource Management Initiative, as described in the Federal Register notice of December 29, 1989, 54 Fed. Reg. 53763.
>
> (2) The United States and the Contractor agree that the Secretary will also complete a programmatic Environmental Impact Statement (EIS) in accordance with the National Environmental Policy Act (NEPA) and a consultation in accordance with Section 7 of the Endangered Species Act (ESA) studying the environmental impacts associated with the execution and renewal of this and other water service contracts in the Friant Unit of the Central Valley project and with the continued diversion and delivery of water thereunder. The United States and the Contractor further agree that the provisions of this contract are subject to modification by the United States, after public meetings and discussions with the Contractor, in accordance with the results of the final EIS and ESA consultation referenced in the immediately preceding sentence and ESA and NEPA: *Provided*, that the Contractor reserves and does not waive any right it may have to challenge the legality and validity of any such modifications made to this contract pursuant to this subarticle 14(c). Notwithstanding any other provisions of this contract (including the preceding sentences of this subarticle), the provisions of this contract covering the right to long-term renewal and quantity of water are nondiscretionary and not subject to change except as required by applicable law."

That case involved an incidental take permit which provided for revocation based on data revealed through future monitoring. Incidental take permits follow consultation and a determination that specified taking will not appreciably affect the species' likelihood of continued existence, *id.*, and therefore are not analogous to pre-consultation agency action. The propriety of modification clauses in incidental take permits has no bearing on the use of modification clauses as an exception to the rule that consultation must be completed before action begins. *See Pacific Rivers*, 30 F.3d at 1056 (citing *Conner*).

It is the "clear mandate" of the statute that a comprehensive Biological opinion precede initiation of the agency action. *Conner*, 848 F.2d at 1455. Execution of the disputed contracts without prior completion of comprehensive consultation violates that mandate. Contractual provision for subsequent environmental review and responsive modification merely establishes an incremental approach to consultation, which is inconsistent with the statute. *Id.*; *see also Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1226-27 (9th Cir. 1988), *cert. denied*, 489 U.S. 1066 (1989) (failure to provide comprehensive, as opposed to incremental, Biological Opinion prior to lease sales violates ESA). Accordingly, I conclude that BOR's execution of Friant water renewal contracts prior to the issuance of FWS's Biological opinion violated ESA.

2. Irreversible and Irretrievable Commitment of Resources Pending Consultation

Once a formal consultation has been initiated, section 7(d) prohibits the irreversible or irretrievable commitments of resources until the process is complete. 16 U.S.C. § 1536(d).[27] The definition of "irreversible and irretrievable commitment" under this section is more stringent than under NEPA. *See Conner*, 848 F.2d at 1457 n.40. Per se irreversible and irretrievable commitments have been found when the physical environment is altered by construction or drilling and when finite resources such as timber are sold. *Pacific Rivers*, 30 F.3d at 1057 & n.16. Although a contract for ongoing water service can, in theory, be prospectively undone, accomplished deliveries can no more be retracted than accomplished timber sales. The fact that water is a more fungible resource than particular trees does not alter this analysis.[28]

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[27] Section 7(d) provides in full:

> "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

[28] The water used on any given day is just as irreplaceable as a particular tree. The flows denied, and harms caused thereby, cannot be restored by future flows, as plaintiffs' extensive scientific and ecological evidence documents.

Moreover, the Friant contracts guarantee quantities of water that re-commit the BOR to total diversion of the San Joaquin River.[29] That underlying commitment is thus "irreversible and irretrievable" by its own terms, despite the BOR's tautological insistence that Article 14 prevents violation of section 7(d). Under these circumstances, agency action must await completion of the entire consultation process. Submission for consultation is only the first step in ESA compliance, and does not itself permit the agency to proceed. *See Lane County*, 958 F.2d at 295 (timber sales authorized by previous management plan may not go forward during consultation regarding superseding plan).

Defendants may not defeat this conclusion by arguing that contract execution does not foreclose conservation-based alternative measures. *See* 16 U.S.C. § 1536(d). While interim deliveries do not themselves preclude future modifications to the delivery system, the contracts by their terms limit future conservation-based modifications to such minor adjustments. Accordingly, any broader conservation-based measures that might be required on the basis of a valid Biological Opinion would be precluded by execution.

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[29] BOR maintains that Article 14 by its terms prevented any "irreversible or irretrievable commitment" during the consultation process. *See* Supplement to Biological Assessment, June 14, 1991, at 1. Article 14 precludes contract amendment as to the quantities of water, however. *See* Biological Opinion, October 15, 1991, at 6.

Even if the delivery of water under the renewal contracts does not constitute an "irreversible and irretrievable commitment of resources, defendants are not entitled to rely on such a determination to justify proceeding under 16 U.S.C. § 1536(d) until formal consultation had been initiated. *Pacific Rivers*, 30 F.3d at 1056-57 (only after agency complies with section 7(a)(2) may activity which may affect a listed species go forward, and then only if there is no irreversible and irretrievable commitment of resources as prohibited by section 7(d)); *Conner*, 848 F.2d at 1455 & n.4 (same). During the initial phase of agency assessment, and until the formal process is commenced, no action that may affect a listed species is permissible. Any other interpretation of section 7(d) would eviscerate the formal consultation requirement. *Id.*

Here, BOR did not seek formal consultation and preparation of a Biological Opinion until May 22, 1991. (Biological Opinion at 1.) Accordingly, even if performance under the renewal contracts is not an irreversible or irretrievable commitment within the meaning of § 7(d), execution of contracts before May 22, 1991, violated the statute.[30]

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[30] Accordingly, BOR's announcement in its biological assessment that Article 14 prevents such commitments, even if otherwise creditable, could not have brought the contracts then being executed into ESA compliance.

3. The 1991 Biological Opinion Does Not Moot the Procedural Claim as to FWS Consultation

Defendants argue that this claim was mooted by the FWS Biological opinion subsequently issued in October 1991.[31] I cannot agree.

The doctrine of mootness rests upon the "case or controversy" requirements of Article III, section 2 of the United States Constitution. *NAACP v. City of Richmond*, 743 F.2d 1346, 1352 (9th Cir. 1984). That requirement forbids federal courts from deciding questions that cannot affect the rights of the litigants in the case before them. *Id.* A moot claim is one where the parties lack a legally cognizable interest in the outcome. *Headwaters, Inc. v. Bureau of Land Management*, 893 F.2d 1012, 1015 (9th Cir. 1989).

A claim accordingly becomes moot when interim relief or events have eradicated the effects of defendant's act or omission. *NAACP*, 743 F.2d at 1352-53. For a claim to meet minimum standards of continuing life, plaintiffs must have suffered some actual injury that can be redressed by a favorable judicial decision. *Id.* at 1353. The

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[31] This contention is distinct from the previously rejected argument that the ESA claim was mooted by passage of the CVPIA. (Order filed November 12, 1993.) The CVPIA requires prospective compliance with ESA, and thus does not affect the procedural regularity of contracts executed pre-CVPIA. The question now presented is whether after-the-fact production of the Biological Opinion provided all the relief to which plaintiffs are entitled as to the procedural irregularity of the pre-CVPIA contracts.

court therefore may not take jurisdiction over a claim for which no effective relief can be granted. *Headwaters*, 893 F.2d at 1015.

Under these principles, plaintiffs' procedural ESA claim is moot only if the 1991 Biological Opinion provided all the relief which could be granted for the injuries inflicted. Defendants maintain that the only possible relief for a purely procedural violation would be an injunction requiring production of the environmental documents, and that this had already been accomplished by the time plaintiffs moved for summary judgment. An injunction requiring completion of consultation is only one of the forms of relief sought by plaintiffs, however.[32] Moreover, the ultimate question is not whether the precise relief requested remains available but whether there can be any effective relief. *See Northwest Environmental Defense Center v. Gordon*, 849 F.2d 1241, 1245 (9th Cir. 1988).

ESA's procedural requirements are strictly enforced in order to effectuate the statute's substantive goals. *See Sierra Club*, 816 F.2d at 1384. The requirement that completed consultation precede the initiation of action ensures that no action will be taken which might jeopardize threatened species. *See* 16 U.S.C. § 1536(a)(2) (agencies must "insure" that their actions are not likely to cause proscribed harms). When action is undertaken prior to a

---

[32] Plaintiffs seek three forms of relief relevant to this claim: a mandatory injunction requiring preparation of required environmental documents, recision of the improperly executed contracts, and a declaration that execution violated ESA.

"no jeopardy" finding, there is no assurance that the harm Congress seeks to prevent will not be inflicted.

Defendants' mootness theory assumes that an after-the-fact "no jeopardy" finding eliminates this problem by demonstrating that no substantive violation has in fact occurred. Although I assume for present analytical purposes that the "no jeopardy" opinion is valid,[33] the injury caused by its untimeliness is not merely a risk of ecological harm which failed to materialize. Plaintiffs have the procedural right under ESA's citizen suit provision, 16 U.S.C. § 1540(g), to challenge the substantive validity of a "no jeopardy" finding. Failure to complete the required review prior to initiation of action deprives plaintiffs of this opportunity, which is a critical aspect of ESA's enforcement scheme. Although the possibility of such a challenge arises when the Biological Opinion is eventually issued, it is then no longer possible to enjoin initiation of the action even in a case requiring such remedy.[34] Late production does not remedy this impairment of plaintiffs' litigation rights.

There is another consequence of late production in this case. As I have previously noted, passage of the CVPIA made contracts expiring thereafter renewable only

---

[33] This remains an open question, posed by plaintiffs' substantive ESA claim.

[34] Congress has explicitly foreclosed the exercise of traditional equitable discretion by courts faced with a violation of section 7 of ESA. *TVA*, 437 U.S. at 173; *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313-14 (1982). Where there is a violation of the statute, the court must enjoin the conduct constituting the violation. *Sierra Club*, 816 F.2d at 1383-84.

for three-year interim terms. Accordingly, contracts which were executed pre-CVPIA but are now subject to recision would be re-negotiable only as interim contracts. (Order filed October 12, 1993, at 11.) The FWS Biological opinion was issued on October 15, 1992, slightly more than a year before the CVPIA took effect. Accordingly, at the time that the document was produced, the contracts would have been renewable for their full terms even after recision. Transformation of the offending contracts into interim agreements was therefore not a remedy available to plaintiffs at the time that the procedural violation was technically cured.

Although the effects of recision in 1991 do not independently overcome the mootness challenge, I conclude that the procedural claim is not remedied in its entirety by the late Biological opinion for the reasons explained above. Resolution of the procedural issue at this time would affect the practical result, and therefore the claim cannot be considered moot. *See DeFunis v. Odegaard,* 416 U.S. 312, 317 (1974) (per curiam). Defendants' theory would eviscerate the requirement of prior compliance by waiving it whenever an agency successfully gambles on an eventual "no jeopardy" finding. This is inconsistent with the clear mandate of ESA. *See TVA,* 437 U.S. at 173; *Sierra Club,* 816 F.2d at 1384; *Conner,* 848 F.2d at 1455. Accordingly, the mootness challenge is rejected.

D. The Orange Cove Contract

The Orange Cove contract was the first executed by BOR. It does not contain Article 14. The federal defendants informally consulted with FWS before execution,

and obtained a written statement from FWS that this particular contract was not likely to affect any listed species. (Letter dated January 12, 1989, AR 1:914-15.) Such a determination obviates the requirement of formal consultation and a Biological Opinion.[35] 50 C.F.R. 402.13(a), 402.14(b). *See Pacific Rivers*, 30 F.3d at 1054 n.8. Accordingly, the undisputed facts establish that defendants complied with the procedures required by ESA as to execution of this contract.[36]

This finding of formal compliance only extends to the federal defendants' ESA obligations regarding species under the jurisdiction of FWS, however. The alleged failure to consult with NMFS regarding the winter-run chinook salmon is a separate matter, to which I now turn.

1. The Failure to Pursue Consultation with NMFS Independently Violates ESA

BOR's Biological Assessment, the basis for its formal consultation with FWS, addressed only land-based species present within the geographic boundaries of the irrigation districts in the Friant-Kern service area. (Biological

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[35] The Orange Cove contract is nonetheless included within the scope of the 1991 FWS Biological Opinion. (Biological Opinion at 5-6, "Description of Proposed Action.") Accordingly, the orange Cove contract may independently rest on that "no jeopardy" finding to the extent that it is substantively valid.

[36] Plaintiffs also challenge the validity of the determination that renewal was "not likely to adversely affect listed species or critical habitat." This issue falls within the substantive ESA claim.

Assessment, April 29, 1991, at 1.) The Assessment specifically excludes species downstream of Friant Dam, in the Delta and Bay estuary, which it notes will be addressed in the San Joaquin River Basin Resource Management Initiative. *Id.* The FWS final Biological Opinion is also limited to the lands of the Friant-Kern service region and does not address the effects of diversion on downstream aquatic species. The Biological opinion makes no explanatory reference to this limitation.[37]

The NMFS is the service with jurisdiction over the winter-run chinook salmon, a threatened (now endangered) species. *See* 50 C.F.R. § 222.23(a). The service has long been aware of the CVP's impact on these salmon, particularly the pumping of Delta water at Tracy for export via the Delta-Mendota Canal, which is a consequence of the diversion of the San Joaquin River by the Friant Dam. In 1991, before passage of the CVPIA and while this litigation was pending, NMFS initiated section 7 consultation regarding the effects of CVP operations overall on the winter-run chinook. That consultation, which is not directly in issue here, excluded direct consideration of the Friant Unit. (Biological Opinion re 1992 CVP Operations at 2.)

At the time that BOR began negotiating and executing the Friant renewal contracts, the agency was well

---

[37] FWS had requested a listing of fisheries in the Friant Unit from NMFS, which responded that they had no such information. (Letter dated June 24, 1991, § 7 AR at 1260.) The letter went on to note that operation and management of the Friant Unit could affect other fisheries downstream of the Friant Unit, including the winter-run chinook. *Id.*

aware of the long history of concern for this salmon population. The Bureau accordingly asked itself ESA's mandatory threshold question: whether its action "may affect" the salmon. By letter dated November 20, 1990, BOR requested NMFS concurrence in its subsequent determination that renewal would not adversely impact the winter-run chinook. (Section 7 AR at 248-49.) Such concurrence by the service terminates the need for formal consultation. 50 CFR § 402.13(a). Absent such concurrence, formal consultation is required.[38]

On November 1, 1991, the Director of NMFS responded with a determination that ESA consultation was not necessary for contract renewal. (Section 7 AR at 4378-79.) NMFS explicitly refused to concur, however, that renewal of the contracts would not affect the fish:

> While we disagree with the Bureau's determination that renewal of Friant contracts are not likely to affect winter-run adversely, for the reasons discussed below, we do not believe a formal consultation on Friant contract renewals is necessary.
>
> While the Friant division of the Central Valley Project (CVP) is remote from the winter-run chinook in the Sacramento River, the interrelated export of Sacramento River water through

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[38] The obligation to pursue consultation is triggered by the initial "may affect" determination. 50 C.F.R. § 402.14(a). An affirmative finding of likely adverse effect is not necessary at this stage. Where the optional informal consultation route is subsequently pursued, a finding of "no likely adverse effect" terminates the process. 50 C.F.R. §§ 402.13(a), 402.14(b). Absent such a finding and concurrence, the obligation continues through preparation of the Biological opinion.

> the Delta Mendota Canal does adversely affect the winter-run of the chinook salmon . . . However, the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureau's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts.

The question before me is whether BOR's determination not to pursue formal consultation violated ESA's procedural requirements. If that decision was arbitrary, capricious, or contrary to law it may be set aside. *Pyramid Lake*, 898 F.2d at 1414. Because NMFS is not a party to this action, the merits of its decision are not before me. The NMFS determination is relevant only to the extent that it demonstrates whether defendants' reliance thereon was "arbitrary and capricious." *Id.*

The BOR has an independent affirmative duty to ensure that its actions do not jeopardize endangered species. 16 U.S.C. § 1536(a)(2). It may not merely rely on the opinions of NMFS or FWS to satisfy its substantive obligations under ESA. *Id.; see also Stop H-3 Ass'n v. Dole*, 740 F.2d 1442, 1460 (9th Cir. 1984), *cert. denied*, 471 U.S. 1108 (1984). The NMFS determination letter plainly expressed disagreement with the agency's determination of no adverse impact. The letter accordingly cannot be construed as concurrence within the meaning of 50 C.F.R. § 402.13(a). Any such interpretation would constitute a clear error of judgment, and thus be arbitrary and capricious. *See Stop H-3*, 740 F.2d at 1460.

The question becomes whether BOR properly relied on NMFS's conclusion that consultation was unnecessary, despite non concurrence as to the absence of adverse effect. The reasons stated for NMFS's conclusion go to their own ongoing activities, and do not address the independent obligations of BOR to insure that its proposed contract renewal does not jeopardize the species. As noted above, NMFS's review of the CVP's overall effects on the winter-run chinook did not directly address Friant operations, let alone contractual water service obligations. The fact that NMFS was satisfied, rightly or wrongly, that overall CVP monitoring would ultimately protect the salmon is irrelevant to the question whether the BOR adequately insured that its conduct would not increase the jeopardy.

BOR's continued reliance on its determination of no adverse impact is untenable in the face, of a contrary NMFS conclusion. Moreover, the NMFS's reasons for not requiring consultation were not rationally related to BOR's obligations under ESA. I therefore conclude that BOR's decision to abandon consultation was arbitrary, capricious, and contrary to law. *See Pyramid Lake*, 898 F.2d at 1414. Because all contracts at issue were executed without completed NMFS consultation, they are procedurally invalid. *See Conner*, 848 F.2d at 1453.

E. The Substantive ESA Claim

This claim is before me on the limited question whether the statutory notice requirement has been satisfied. The citizen suit provisions of ESA require that "[n]o action shall be commenced [to enforce the Secretary's

compliance with the statute] prior to sixty days after written notice has been given to the Secretary." 16 U.S.C. § 1540(g)(2)(C). Failure to provide timely written notice pursuant to this section is a jurisdictional defect. *Save the Yaak Committee v. Block*, 840 F.2d 714, 721 (9th Cir. 1988). The notice requirement is strictly enforced, and may not be varied on equitable grounds or satisfied by staying a case that has already been filed to provide for notice and the passage of 60 days. *Hallstrom v. Tillamook County*, 493 U.S. 20, 26-27 (1989) (interpreting parallel provision of the Resource Conservation and Recovery Act of 1976 ("RCRA")).[39]

Plaintiffs originally notified the Secretary of the Interior by letter dated November 18, 1988, of their intent to sue on the grounds that endangered species existed in the area affected by the proposed renewal contracts and that ESA compliance was therefore required prior to execution. The original complaint, filed less than 60 days later, did not contain an ESA claim. Such a claim was added by the First Amended complaint, filed February 6, 1989. Plaintiffs then alleged, consistent with the position previously announced to the Secretary, that compliance with ESA's consultation and environmental review procedures was required prior to contract execution. In other words, the original ESA claim alleged a purely procedural violation.

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[39] As the Court noted, the 60-day notice requirements of RCRA and ESA are both derived from the Clean Air Act. *Hallstrom*, 493 U.S. at 23 n.1. The Ninth Circuit applies the same analysis to the notice requirements of RCRA and ESA. *Save the Yaak*, 840 F.2d at 721.

The distinct claim that ESA was also violated by the inadequacy of the 1991 Biological Opinion was first stated in the Third Amended Complaint, filed June 17, 1992. No separate notice of intent to sue on this theory had been provided to the Secretary. The question whether this substantive ESA claim was barred by failure to provide statutory notice was first raised by defendants in a footnote to their post-CVPIA motion to dismiss. Further briefing was ordered, and plaintiffs were specifically directed to present any evidence supporting a finding of compliance with the notice requirement. (Order filed October 12, 1993, at 18-19, 45.)

No such documentation has been produced. Plaintiffs have abandoned their earlier arguments that the notice requirement should be broadly interpreted and that their original 1988 notice of intent to sue reasonably embraced the subsequently arising claim regarding the adequacy of biological review. They now stipulate to voluntary dismissal of the substantive ESA claim, and seek leave to amend after a new proper notice period has expired. Plaintiffs also seek leave to amend for the purpose of adding any supplemental claims arising under the CVPIA.

Pursuant to the agreement of the parties, the substantive ESA claim will accordingly be dismissed without prejudice. Defendants have objected to the proposed amendments, but articulated no basis for their objection. Leave to amend will accordingly be granted, but stayed to permit interlocutory appeal of the issues previously designated for such review. Any claims added by subsequent amendment shall be subject to challenge as to form

and content. Moreover, because amendment is anticipated as to the substantive claim, I do not reach the question of remedy as to the procedural violations found herein.

III.

ORDER

Accordingly, for all the reasons stated above, IT IS HEREBY ORDERED as follows:

1. Defendants' motions for summary judgment are **GRANTED** as to the NEPA claim;

2. Plaintiffs' motion for summary judgment is **GRANTED** as to the procedural ESA claim;

3. Plaintiffs' substantive ESA claim is **DISMISSED** without prejudice;

4. Plaintiffs are **GRANTED LEAVE TO AMEND** for the purposes of:

a. Repleading their substantive ESA claim; and

b. Pleading claims arising under the CVPIA;

c. Such leave to amend is **STAYED** pending interlocutory appeal pursuant to this Order;

5. Pursuant to the court's previously expressed intentions and the agreement of the parties at hearing, the following questions are hereby **CERTIFIED** for interlocutory appeal under 28 U.S.C. § 1292(b):

a. Whether the order filed October 12, 1993, denying defendants' motion to dismiss, solely as to the

preemption of plaintiffs' claim under section 8 of the Reclamation Act and section 5937 of the Cal. Fish & Game Code by the Central Valley Project Improvement Act is correct;

b. Whether the instant Order granting defendants' motions for summary judgment as to the NEPA claim is correct;

c. Whether the instant Order granting plaintiffs' motion for summary judgment as to the procedural ESA claim is correct.

IT IS SO ORDERED.

DATED: May 30, 1995.

/s/ Lawrence K. Karlton
LAWRENCE K. KARLTON
CHIEF JUDGE EMERITUS
UNITED STATES DISTRICT COURT

United States District Court
for the
Eastern District of California
May 31, 1995

** CERTIFICATE OF SERVICE **

2:88-cv-01658

Natural Resources De

v.

Houston

I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District Court, Eastern District of California.

That on May 31, 1995, I SERVED a true and correct copy(ies) of the attached, by placing said copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle located in the Clerk's office.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUSALITO IRRIGATION DISTRICT; STONE CORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16030
DC No. CV 88-1658 LKK

(Filed Sept. 8, 1998)

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ORANGE COVE IRRIGATION DISTRICT; DELANO-EARLIMART IRRIGATION DISTRICT; EXETER IRRIGATION DISTRICT; IVANHOE IRRIGATION DISTRICT; LINDMORE IRRIGATION DISTRICT; LINDSAY-STRATHMORE IRRIGATION DISTRICT; TERRA BELLA IRRIGATION DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16041
DC No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

FRIANT WATER USERS AUTHORITY,

Defendant-Appellant.

No. 97-16042
DC No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

MADERA IRRIGATION DISTRICT; CHOWCHILLA WATER DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16043
DC No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

ARVIN-EDISON WATER STORAGE DISTRICT; SHAFTER-WASCO IRRIGATION DISTRICT; SOUTHERN SAN JOAQUIN MUNICIPAL UTILITY DISTRICT,

Defendants-Intervenors-Appellants.

No. 97-16044
DC No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

DAVID G. HOUSTON,

Defendant,

and

TULARE IRRIGATION DISTRICT,

Defendant-Intervenor-Appellant.

No. 97-16045
DC No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATON; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellees,

v.

ROGER PATTERSON, as Regional Director of the U.S. Bureau of Reclamation; BRUCE BABBITT, as Secretary of the Interior,

Defendants-Appellants,

No. 97-16155
DC No. CV 88-1658 LKK

NATURAL RESOURCES DEFENSE COUNCIL; TROUT UNLIMITED OF CALIFORNIA; BAY INSTITUTE OF SAN FRANCISCO; CALIFORNIA NATURAL RESOURCES FEDERATION; CALIFORNIA SPORTFISHING PROTECTION ALLIANCE; CALIFORNIA TROUT; FRIENDS OF THE RIVER; NORTHERN CALIFORNIA GUIDES ASSOCIATION; PACIFIC COAST FEDERATION OF FISHERMEN'S ASSOCIATIONS; SAN JOAQUIN RAPTOR RESCUE CENTER; SIERRA CLUB; STANISLAUS AUDUBON SOCIETY, INC.; UNITED ANGLERS OF CALIFORNIA; CALIFORNIA STRIPED BASS ASSOCIATION; NATIONAL AUDUBON SOCIETY,

Plaintiffs-Appellants,

v.

ROGER PATTERSON as Regional Director of the U.S. Bureau of Reclamation; BRUCE BABBITT; FRIANT WATER USERS AUTHORITY,

Defendants-Appellees,

and

LOWER TULE RIVER IRRIGATION DISTRICT; PORTERVILLE IRRIGATION DISTRICT; SAUSALITO IRRIGATION DISTRICT; STONECORRAL IRRIGATION DISTRICT; TEAPOT DOME WATER DISTRICT,

Defendants-Intervenors-Appellees.

No. 97-16173
DC No. CV 88-1658 LKK

ORDER

Before: SKOPIL, D.W. NELSON, and TASHIMA, Circuit Judges.

The panel has voted to deny the petitions for rehearing. Judge Tashima has voted to reject the suggestions for rehearing en banc and Judges Skopil and Nelson so recommend.

The full court has been advised of the suggestions for rehearing en banc, and no judge of the court has requested a vote on the suggestions for rehearing en banc. Fed. R. App. P. 35(b).

The petitions for rehearing are denied and the suggestions for rehearing en banc are rejected.

PUBLIC LAW 102-575
[H.R. 429]; OCTOBER 30, 1992
RECLAMATION PROJECTS AUTHORIZATION AND ADJUSTMENT ACT OF 1992

For Legislative History of Act, see p. 4041.

An Act to authorize additional appropriations for the construction of the Buffalo Bill Dam and Reservoir, Shoshone Project, Pick-Sloan Missouri Basin Program, Wyoming.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Reclamation Projects Authorization and Adjustment Act of 1992".

SEC. 2. DEFINITION AND TABLE OF CONTENTS.

For the purposes of this Act, the term "Secretary" means the Secretary of the Interior.

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Sec. 202. Bonneville Unit water development.

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TITLE XXXIV – CENTRAL VALLEY PROJECT IMPROVEMENT ACT

SEC. 3401. SHORT TITLE.

This title may be cited as the "Central Valley Project Improvement Act".

SEC. 3402. PURPOSES.

The purposes of this title shall be –

(a) to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley and Trinity river basins of California;

(b) to address impacts of the Central Valley Project on fish, wildlife and associated habitats;

(c) to improve the operational flexibility of the Central Valley Project;

(d) to increase water-related benefits provided by the Central Valley Project to the State of California through expanded use of voluntary water transfers and improved water conservation;

(e) to contribute to the State of California's interim and long-term efforts to protect the San Francisco Bay/Sacramento-San Joaquin Delta Estuary;

(f) to achieve a reasonable balance among competing demands for use of Central Valley Project water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors.

SEC. 3403. DEFINITIONS.

As used in this title –

(a) the term "anadromous fish" means those stocks of salmon (including steelhead), striped bass, sturgeon, and American shad that ascend the Sacramento and San Joaquin rivers and their tributaries and the Sacramento-San Joaquin Delta to reproduce after maturing in San Francisco Bay or the Pacific Ocean

(b) the terms "artificial propagation" and "artificial production" mean spawning, incubating, hatching, and rearing fish in a hatchery or other facility constructed for fish production;

(c) the term "Central Valley Habitat Joint Venture" means the association of Federal and State agencies and private parties established for the purpose of developing and implementing the North American Waterfowl Management Plan as it pertains to the Central Valley of California;

(d) the terms "Central Valley Project" or "project" mean all Federal reclamation projects located within or diverting water from or to the watershed of the Sacramento and San Joaquin rivers and their tributaries as authorized by the Act of August 26, 1937 (50 Stat. 850) and all Acts amendatory or supplemental thereto, including but not limited to the Act of October 17, 1940 (54 Stat. 1198, 1199), Act of December 22, 1944 (58 Stat. 887), Act of October 14, 1949 (63 Stat. 852), Act of September 26, 1950 (64 Stat. 1036), Act of August 27, 1954 (68 Stat. 879), Act

of August 12, 1955 (69 Stat. 719), Act of June 3, 1960 (74 Stat. 156), Act of October 23, 1962 (76 Stat. 1173), Act of September 2, 1965 (79 Stat. 615), Act of August 19, 1967 (81 Stat. 167), Act of August 27, 1967 (81 Stat. 173), Act of October 23, 1970 (84 Stat. 1097), Act of September 28, 1976 (90 Stat. 1324) and Act of October 27, 1986 (100 Stat. 3050);

(e) the term "Central Valley Project service area" means that area of the Central Valley and San Francisco Bay Area where water service has been expressly authorized pursuant to the various feasibility studies and consequent congressional authorizations for the Central Valley Project;

(f) the term "Central Valley Project water" means all water that is developed, diverted, stored, or delivered by the Secretary in accordance with the statutes authorizing the Central Valley Project and in accordance with the terms and conditions of water rights acquired pursuant to California law;

(g) the term "full cost" has the meaning given such term in paragraph (3) of section 202 of the Reclamation Reform Act of 1982;

(h) the term "natural production" means fish produced to adulthoood without direct human intervention in the spawning, rearing, or migration processes;

(i) the term "Reclamation laws" means the Act of June 17, 1902 (82 Stat. 388) and all Acts amendatory thereof or supplemental thereto;

(j) the term "Refuge Water Supply Report" means the report issued by the Mid-Pacific Region of the Bureau of Reclamation of the U.S. Department of the Interior entitled Report on Refuge Water Supply Investigations, Central Valley Hydrologic Basin, California (March 1989);

(k) the terms "repayment contract" and "water service contract" have the same meaning as provided in sections 9(d) and 9(e) of the Reclamation Project Act of 1939 (53 Stat. 1187, 1195), as amended;

(l) the terms "Restoration Fund" and "Fund" mean the Central Valley Project Restoration Fund established by this title; and,

(m) the term "Secretary" means the Secretary of the Interior.

SEC. 3404. LIMITATION ON CONTRACTING AND CONTRACT REFORM.

(a) NEW CONTRACTS. – Except as provided in subsection (b) of this section, the Secretary shall not enter into any new short-term, temporary, or long-term contracts or agreements for water supply from the Central Valley Project for any purpose other than fish and wildlife before:

(1) the provisions of subsections 3406(b)-(d) of this title are met;

(2) the California State Water Resources Control Board concludes the review ordered by the California Court of Appeals in United States v. State Water Resources Control Board, 182 Cal. App. 3d 82

(1986) and determines the means of implementing its decision, including the obligations of the Central Valley Project, if any, and the Administrator of the Environmental Protection Agency shall have approved such decision pursuant to existing authorities; and,

(3) at least one hundred and twenty days shall have passed after the Secretary provides a report to the Committee on Energy and natural Resources of the Senate and the Committee on Interior and Insular Affairs and the Committee on Merchant Marine and Fisheries of the House of Representatives explaining the obligations, if any, of the Central Valley Project system, including its component facilities and contracts, with regard to achieving its responsibilities for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary as finally established and approved by relevant State and Federal authorities, and the impact of such obligations on Central Valley Project operations, supplies, and commitments.

(b) EXCEPTIONS TO LIMIT ON NEW CONTRACTS. – The prohibition on execution of new contracts under subsection (a) of this section shall not apply to contracts executed pursuant to section 305 of Public Law 102-250 or section 206 of Public Law 101-514 or to one-year contracts for delivery of surplus flood flows or contracts not to exceed two years in length for delivery of class II water in the Friant Unit. Notwithstanding the prohibition in the Energy and Water Development Appropriations Act of 1990, the Secretary is authorized, pursuant to section 203 of the Flood Control Act of 1962, to enter into a long-term contract in accordance with the Reclamation laws with the Tuolumne Regional Water District, California, for the delivery of water from the New Melones project to the

county's water distribution system and a contract with the Secretary of Veteran Affairs to provide for the delivery in perpetuity of water from the project in quantities sufficient, but not to exceed 850 acre-feet per year, to meet the needs of the San Joaquin Valley National Cemetery, California.

(c) RENEWAL OF EXISTING LONG-TERM CONTRACTS. – Notwithstanding the provisions of the Act of July 2, 1956 (70 Stat. 483), the Secretary shall, upon request, renew any existing long-term repayment or water service contract for the delivery of water from the Central Valley Project for a period of twenty-five years and may renew such contracts for successive periods of up to 25 years each.

(1) No such renewals shall be authorized until appropriate environmental review, including the preparation of the environmental impact statement required in section 3409 of this title, has been completed. Contracts which expire prior to the completion of the environmental impact statement required by section 3409 may be renewed for an interim period not to exceed three years in length, and for successive interim periods of not more than two years in length, until the environmental impact statement required by section 3409 has been finally completed, at which time such interim renewal contracts shall be eligible for long-term renewal as provided above. Such interim renewal contracts shall be modified to comply with existing law, including provisions of this title. With respect to all contracts renewed by the Secretary since January 1, 1988, the Secretary shall incorporate in said contracts a provision requiring payment of the charge mandated in subsection 3406(c) and subsection 3407(b) of this title

and all other modifications needed to comply with existing law, including provisions of this title. This title shall be deemed "applicable law" as that term is used in Article 14(c) of contracts renewed by the Secretary since January 1, 1988.

(2) Upon renewal of any long-term repayment or water service contract providing for the delivery of water from the Central Valley Project, the Secretary shall incorporate all requirements imposed by existing law, including provisions of this title, within such renewed contracts. The Secretary shall also administer all existing, new, and renewed contracts in conformance with the requirements and goals of this title.

(3) In order to encourage early renewal of project water contracts and facilitate timely implementation of this title, the Secretary shall impose on existing contractors an additional mitigation and restoration payment of one and one-half times the annual mitigation and restoration payment calculated under subsection 3407(d) of this title for every year starting October 1, 1997 or January 1 of the year following the year in which the environmental impact statement required under section 3409 is completed, whichever is sooner, and ending on the effective date of the renewed contract payable prior to the renewal of such contract, to be covered to the Restoration Fund: *Provided, however,* That this paragraph shall not apply to contracts renewed after January 1, 1988, and prior to the date of enactment of this title or, in the event the environmental impact statement required by section 3409 is not completed by October 1, 1997, to any holder of a contract in existence on the date of enactment of this title who enters into a binding agreement with the Secretary prior to October 1, 1997, to renew its contract immediately upon

completion of that environmental impact statement, if such contract has not expired prior to such date.

SEC. 3405. WATER TRANSFERS, IMPROVED WATER MANAGEMENT AND CONSERVATION.

(a) WATER TRANSFERS. – In order to assist California urban areas, agricultural water users, and others in meeting their future water needs, subject to the conditions and requirements of this subsection, all individuals or districts who receive Central Valley Project water under water service or repayment contracts, water rights settlement contracts or exchange contracts entered into prior to or after the date of enactment of this title are authorized to transfer all or a portion of the water subject to such contract to any other California water user or water agency, State or Federal agency, Indian tribe, or private nonprofit organization for project purposes or any purpose recognized as beneficial under applicable State law. Except as provided herein, the terms of such transfers shall be set by mutual agreement between the transferee and the transferor.

(1) CONDITIONS FOR TRANSFERS. – All transfers to Central Valley Project water authorized by this subsection shall be subject to review and approval by the Secretary under the conditions specified in this subsection. Transfers involving more than 20 percent of the Central Valley Project water subject to long-term contract within any contracting district or agency shall also be subject to review and approval by such district or agency under the conditions specified in this subsection:

(A) No transfer to combination of transfers authorized by this subsection shall exceed, in

any year, the average annual quantity of water under contract actually delivered to the contracting district or agency during the last three years of normal water delivery prior to the date of enactment of this title.

(B) All water under the contract which is transferred under authority of this subsection to any district or agency which is not a Central Valley Project contractor at the time of enactment of this title shall, if used for irrigation purposes, be repaid at the greater of the full-cost or cost of service rates, or, if the water is used for municipal and industrial purposes, at the greater of the cost of service or municipal and industrial rates.

(C) No transfers authorized by this subsection shall be approved unless the transfer is between a willing buyer and a willing seller under such terms and conditions as may be mutually agreed upon.

(D) No transfer authorized by this subsection shall be approved unless the transfer is consistent with State law, including but not limited to provisions of the California Environmental Quality Act.

(E) All transfers authorized by this subsection shall be deemed a beneficial use of water by the transferor for the purposes of section 8 of the Act of June 17, 1902, 32 Stat. 390, 43 U.S.C. 372.

(F) All transfers entered into pursuant to this subsection for uses outside the Central Valley Project service area shall be subject to a right of first refusal on the same terms and conditions

by entities within the Central Valley Project service area. The right of first refusal must be exercised within ninety days from the date that notice is provided of the proposed transfer. Should an entity exercise the right of first refusal, it must compensate the transferee who had negotiated the agreement upon which the right of first refusal is being exercised for that entity's total costs associated with the development and negotiation of the transfer.

(G) No transfer authorized by this subsection shall be considered by the Secretary as conferring supplemental or additional benefits on Central Valley Project water contractors as provided in section 203 of Public Law 97-293 (43 U.S.C. 390(cc)).

(H) The Secretary shall not approve a transfer authorized by this subsection unless the Secretary has determined, consistent with paragraph 3405(a)(2) of this title, that the transfer will not violate the provisions of this title or other Federal law and will have no significant adverse effect on the Secretary's ability to deliver water pursuant to the Secretary's Central Valley Project contractual obligations or fish and wildlife obligations under this title because of limitations in conveyance or pumping capacity.

(I) The water subject to any transfer undertaken pursuant to this subsection shall be limited to water that would have been consumptively used or irretrievable lost to beneficial use during the year or years of the transfer.

(J) The Secretary shall not approve a transfer authorized by this subsection unless the Secretary determines, consistent with paragraph 3405(a)(2) of this title, that such transfer will

have no significant long-term adverse impact on groundwater conditions in the transferor's service area.

(K) The Secretary shall not approve a transfer unless the Secretary determines, consistent with paragraph 3405(a)(2) of this title, that such transfer will have no unreasonable impact on the water supply, operations, or financial conditions of the transferor's contracting district or agency or its water users.

(L) The Secretary shall not approve a transfer if the Secretary determines, consistent with paragraph 3405(a)(2) of this title, that such transfer would result in a significant reduction in the quantity or decrease in the quality of water supplies currently used for fish and wildlife purposes, unless the Secretary determines pursuant to findings setting forth the basis for such determination that such adverse effects would be more than offset by the benefits of the proposed transfer. In the event of such a determination, the Secretary shall develop and implement alternative measures and mitigation activities as integral and concurrent elements of any such transfer to provide fish and wildlife benefits substantially equivalent to those lost as a consequence of such transfer.

(M) Transfers between Central Valley Project contractors within countries, watersheds, or other areas of origin, as those terms are utilized under California law, shall be deemed to meet the conditions set forth in subparagraphs (A) and (I) of this paragraph.

(2) REVIEW AND APPROVAL OF TRANSFERS. – All transfers subject to review and approval under this subsection

shall be reviewed and approved in a manner consistent with the following:

(A) Decisions on water transfers subject to review by a contracting district or agency or by the Secretary shall be rendered within ninety days of receiving a written transfer proposal from the transferee or transferor. Such written proposal should provide all information reasonably necessary to determine whether the transfer complies with the terms and conditions of this subsection.

(B) All transfers subject to review by a contracting district or agency shall be reviewed in a public process similar to that provided for in section 226 of Public Law 97-293.

(C) The contracting district or agency or the Secretary shall approve all transfers subject to review and approval by such entity if such transfers are consistent with the terms and conditions of this subsection. To disapprove a transfer, the contracting district or agency or the Secretary shall inform the transferee and transferor, in writing, why the transfer does not comply with the terms and conditions of this subsection and what alternatives, if any, could be included so that the transfer would reasonably comply with the requirements of this subsection.

(D) If the contracting district or agency or the Secretary fails to approve or disapprove a proposed transfer within ninety days of receiving a complete written proposal from the transferee or transferor, then the transfer shall be deemed approved.

(3) Transfers executed after September 30, 1999 shall only be governed by the provisions of subparagraphs 3405(a)(1)(A)-(C), (E), (G), (H), (I), (L), and (M) of this title, and by State law.

(b) METERING OF WATER USE REQUIRED. – All Central Valley Project water service or repayment contracts for agricultural, municipal, or industrial purposes that are entered into, renewed, or amended under any provision of Federal Reclamation law after the date of enactment of this title, shall provide that the contracting district or agency shall ensure that all surface water delivery systems within its boundaries are equipped with water measuring devices or water measuring methods of comparable effectiveness acceptable to the Secretary within five years of the date of contract execution, amendment, or renewal, and that any new surface water delivery systems installed within its boundaries on or after the date of contract renewal are so equipped. The contracting district or agency shall inform the Secretary and the State of California annually as to the monthly volume of surface water delivered within its boundaries.

(c) STATE AND FEDERAL WATER QUALITY STANDARDS. – All Central Valley Project water service or repayment contracts for agricultural, municipal, or industrial purposes that are entered into, renewed, or amended under any provision of Federal Reclamation law after the date of enactment of this title, shall provide that the contracting district or agency shall be responsible for compliance with all applicable State and Federal water quality standards applicable to surface and subsurface agricultural drainage discharges generated within its boundaries. This

subsection shall not affect or alter any legal obligation of the Secretary to provide drainage services.

(d) WATER PRICING REFORM. – All Central Valley Project water service or repayment contracts for a term longer than three years for agricultural, municipal, or industrial purposes that are entered into, renewed, or amended under any provision of Federal Reclamation law after the date of enactment of this title shall provide that all project water subject to contract shall be made available to districts, agencies, and other contracting entities pursuant to a system of tiered water pricing. Such a system shall specify rates for each district, agency or entity based on an inverted black rate structure with the following provisions:

(1) the first rate tier shall apply to a quantity of water up to 80 percent of the contract total and shall not be less than the applicable contract rate;

(2) the second rate tier shall apply to that quantity of water over 80 percent and under 90 percent of the contract total and shall be at a level halfway between the rates established under paragraphs (1) and (3) of this subsection;

(3) the third rate tier shall apply to that quantity of water over 90 percent of the contract total and shall not be less than the full cost rate; and

(4) the Secretary shall charge contractors only for water actually delivered.

The Secretary shall waive application of this subsection as it relates to any project water delivered to produce a crop which the Secretary determines will provide significant and quantifiable habitat values for waterfowl in

fields where the water is used and the crops are produced: *Provided,* That such waiver shall apply only if such habitat values can be assured consistent with the purposes of this title through binding agreements executed with or approved by the Secretary.

(e) WATER CONSERVATION STANDARDS. – The Secretary shall establish and administer an office of Central Valley Project water conservation best management practices that shall, in consultation with the Secretary of Agriculture, the California Department of Water Resources, California academic institutions, and Central Valley Project water users, develop criteria for evaluating the adequacy of all water conservation plans developed by project contractors, including those plans required by section 210 of the Reclamation Reform Act of 1982.

(1) Criteria developed pursuant to this subsection shall be established within six months following enactment of this title and shall be reviewed periodically thereafter, but no less than every three years, with the purpose of promoting the highest level of water use efficiency reasonably achievable by Project contractors using best available cost-effective technology and best management practices. The criteria shall include, but not be limited to agricultural water suppliers' efficient water management practices developed pursuant to California State law or reasonable alternatives.

(2) The Secretary, through the office established under this subsection, shall review and evaluate within 18 months following enactment of this title all existing conservation plans submitted by project contractors to determine whether they meet the conservation and efficiency criteria established pursuant to this subsection.

(3) In developing the water conservation best management practice criteria required by this subsection, the Secretary shall take into account and grant substantial deference to the recommendations for action specific to water conservation and drainage source reduction proposed in the Final Report of the San Joaquin Valley Drainage Program, entitled A Management Plan for Agricultural Subsurface Drainage and Related Problems on the Westside San Joaquin Valley (September 1990).

(f) INCREASED REVENUES. – All revenues received by the Secretary as a result of the increased repayment rates applicable to water transferred from irrigation use to municipal and industrial use under subsection 3405(a) of this section, and all increased revenues received by the Secretary as a result of the increased water prices established under subsection 3405(d) of this section, shall be covered to the Restoration Fund.

SEC. 3406. FISH, WILDLIFE AND HABITAT RESTORATION.

(a) AMENDMENTS TO CENTRAL VALLEY PROJECT AUTHORIZATIONS. – Act of August 26, 1937. – Section 2 of the Act of August 26, 1937 (chapter 832; 50 Stat. 850), as amended, is amended –

(1) in the second proviso of subsection (a), by inserting "and mitigation, protection, and restoration of fish and wildlife after "Indian reservations,";

(2) in the last proviso of subsection (a), by striking "demestic uses;" and inserting "domestic uses and fish and wildlife mitigation, protection and restoration purposes;" and by striking "power" and inserting "power and fish and wildlife enhancement";

(3) by adding at the end of the following: "The mitigation for fish and wildlife losses incurred as a result of construction, operation, or maintenance of the Central Valley Project shall be based on the replacement of ecologically equivalent habitat and shall take place in accordance with the provisions of this title and concurrent with any future actions which adversely affect fish and wildlife populations or their habitat but shall have no priority over them."; and

(4) by adding at the end the following: "(e) Nothing in this title shall affect the State's authority to condition water rights permits for the Central Valley Project."

(b) FISH AND WILDLIFE RESTORATION ACTIVITIES. – The Secretary, immediately upon the enactment of this title, shall operate the Central Valley Project to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species act, 16 U.S.C. 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project. The Secretary, in consultation with other State and Federal agencies, Indian tribes, and affected interests, is further authorized and directed to:

(1) develop within three years of enactment and implement a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991; *Provided*, That this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota

Pool, for which a separate program is authorized under subsection 3406(c) of this title; *Provided further,* That the programs and activities authorized by this section shall, when fully implemented, be deemed to meet the mitigation, protection, restoration, and enhancement purposes established by subsection 3406(a) of this title; *And provided further,* That, in the course of developing and implementing this program the Secretary shall make all reasonable efforts consistent with the requirements of this section to address other identified adverse environmental impacts of the Central Valley Project not specifically enumerated in this section.

(A) This program shall give first priority to measures which protect and restore natural channel and riparian habitat values through habitat restoration actions, modifications to Central Valley Project operations, and implementation of the supporting measures mandated by this subsection; shall be reviewed and updated every five years; and shall describe how the Secretary intends to operate the Central Valley Project to meet the fish, wildlife, and habitat restoration goals and requirements set forth in this title and other project purposes.

(B) As needed to achieve the goals of this program, the Secretary is authorized and directed to modify Central Valley Project operations to provide flows of suitable quality, quantity, and timing to protect all life stages of anadromous fish, except that such flows shall be provided from the quantity of water dedicated to fish, wildlife, and habitat restoration purposes under paragraph (2) of this subsection; from the water supplies acquired pursuant to paragraph (3) of this subsection; and from other sources

which do not conflict with fulfillment of the Secretary's remaining contractual obligations to provide Central Valley Project water for other authorized purposes. Instream flow needs for all Central Valley Project controlled streams and rivers shall be determined by the Secretary based on recommendations of the United States Fish and Wildlife Service after consultation with the California Department of Fish and Game.

(C) The Secretary shall cooperate with the State of California to ensure that, to the greatest degree practicable, the specific quantities of yield dedicated to and managed for fish and wildlife purposes under this title are credited against any additional obligations of the Central Valley Project which may be imposed by the State of California following enactment of this title, including but not limited to increased flow and reduced export obligations which may be imposed by the California State Water Resources Control Board in implementing San Francisco Bay/Sacramento-San Joaquin Delta Estuary standards pursuant to the review ordered by the California Court of Appeals in United States v. State Water Resources Control Board, 182 Cal.App.3d 82 (1986), and that, to the greatest degree practicable, the programs and plans required by this title are developed and implemented in a way that avoids inconsistent or duplicative obligations from being imposed upon Central Valley Project water and power contractors.

(D) Costs associated with this paragraph shall be reimbursable pursuant to existing statutory and regulatory procedures.

(2) upon enactment of this title dedicate and manage annually eight hundred thousand acre-feet of Central Valley Project yield for the primary purpose of implementing the fish, wildlife, and habitat restoration purposes and measures authorized by this title; to assist the State of California in its efforts to protect the waters of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary; and to help to meet such obligations as may be legally imposed upon the Central Valley Project under State or Federal law following the date of enactment of this title, including but not limited to additional obligations under the Federal Endangered Species Act. For the purpose of this section, the term "Central Valley Project yield" means the delivery capability of the Central Valley Project during the 1928-1934 drought period after fishery, water quality, and other flow and operational requirements imposed by terms and conditions existing in licenses, permits, and other agreements pertaining to the Central Valley Project under applicable State or Federal law existing at the time of enactment of this title have been met.

(A) Such quantity of water shall be in addition to the quantities needed to implement paragraph 3406(d)(1) of this title and in addition to all water allocated pursuant to paragraph (23) of this subsection for release to the Trinity River for the purposes of fishery restoration, propagation, and maintenance; and shall be supplemented by all water that comes under the Secretary's control pursuant to subsections 3406(b)(3), 3408(h)-(i), and through other measures consistent with subparagraph 3406(b)(1)(B) of this title.

(B) Such quantity of water shall be managed pursuant to conditions specified by the

United States Fish and Wildlife Service after consultation with the Bureau of Reclamation and the California Department of Water Resources and in cooperation with the California Department of Fish and Game.

(C) The Secretary may temporarily reduce deliveries of the quantity of water dedicated under this paragraph up to 25 percent of such total whenever reductions due to hydrologic circumstances are imposed upon agricultural deliveries of Central Valley Project water; *Provided,* That such reductions shall not exceed in percentage terms the reductions imposed on agricultural service contractors; *Provided further,* That nothing in this subsection or subsection 3406(e) shall require the Secretary to operate the project in a way that jeopardizes human health or safety.

(D) If the quantity of water dedicated under this paragraph, or any portion thereof, is not needed for the purposes of this section, based on a finding by the Secretary, the Secretary is authorized to make such water available for other project purposes.

(3) develop and implement a program in coordination and in conformance with the plan required under paragraph (1) of this subsection for the acquisition of a water supply to supplement the quantity of water dedicated to fish and wildlife purposes under paragraph (2) of this subsection and to fulfill the Secretary's obligations under paragraphs 3406(d)(2) of this title. The program should identify how the Secretary intends to utilize, in particular the following options; improvements in or modifications of the operations of the project; water banking; conservation; transfers; conjunctive use; and temporary and permanent land fallowing, including purchase,

lease, and option of water, water rights, and associated agricultural land.

(4) develop and implement a program to mitigate for fishery impacts associated with operations of the Tracy Pumping Plant. Such program shall include, but is not limited to improvement or replacement of the fish screens and fish recovery facilities and practices associated with the Tracy Pumping Plant. Costs associated with this paragraph shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California. The reimbursable share of funding for this and other facility repairs, improvements, and construction shall be allocated among project water and power users in accordance with existing project cost allocation procedures.

(5) develop and implement a program to mitigate for fishery impacts resulting from operations of the Contra Costa Canal Pumping Plant No. 1. Such program shall provide for construction and operation of fish screening and recovery facilities, and for modified practices and operations. Costs associated with this paragraph shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(6) install and operate a structural temperature control device at Shasta Dam and develop and implement modifications in CVP operations as needed to assist in the Secretary's efforts to control water temperatures in the upper Sacramento River in

order to protect anadromous fish in the upper Sacramento River. Costs associated with planning and construction of the structural temperature control device shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(7) meet flow standards and objectives and diversion limits set forth in all laws and judicial decisions that apply to Central Valley Project facilities, including, but not limited to, provisions of this title and all obligations of the United States under the "Agreement Between the United States and the Department of Water Resources of the State of California for Coordinated Operation of the Central Valley Project and the State Water Project" dated May 20, 1985, as well as Public Law 99-546.

(8) make use of short pulses of increased water flows to increase the survival of migrating anadromous fish moving into and through the Sacramento-San Joaquin Delta and Central Valley rivers and streams.

(9) develop and implement a program to eliminate, to the extent possible, losses of anadromous fish due to flow fluctuations caused by the operation of any Central Valley Project storage or re-regulating facility. The program shall be patterned where appropriate after the agreement between the California Department of Water Resources and the California Department of Fish and Game with respect to the operation of the California State Water Project Oroville Dam complex.

(10) develop and implement measures to minimize fish passage problems for adult and juvenile anadromous fish at the Red Bluff Diversion Dam in a

manner that provides for the use of associated Central Valley Project conveyance facilities for delivery of water to the Sacramento Valley National Wildlife Refuge complex in accordance with the requirements of subsection (d) of this section. Costs associated with implementation of this paragraph shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(11) rehabilitate and expand the Coleman National Fish Hatchery by implementing the United States Fish and Wildlife Service's Coleman National Fish Hatchery Development Plan, and modify the Keswick Dam Fish Trap to provide for its efficient operation at all project flow release levels and modify the basin below the Keswick Dam spillway to prevent the trapping of fish. Costs associated with implementation of this paragraph shall be reimbursed in accordance with the following formula: 50 percent shall be reimbursed as main project features and 50 percent shall be considered a nonreimbursable Federal expenditure.

(12) develop and implement a comprehensive program to provide flows to allow sufficient spawning, incubation, rearing, and outmigration for salmon and steelhead from Whiskeytown Dam as determined by instream flow studies conducted by the California Department of Fish and Game after Clear Creek has been restored and a new fish ladder has been constructed at the McCormick-Seltzer Dam. Costs associated with channel restoration, passage improvements, and fish ladder construction required by this paragraph shall be allocated 50 percent to the United States as a nonreimbursable expenditure and

50 percent to the State of California. Costs associated with providing the flows required by this paragraph shall be allocated among project purposes.

(13) develop and implement a continuing program for the purpose of restoring and replenishing, as needed, spawning gravel lost due to the construction and operation of Central Valley Project dams, bank protection projects, and other actions that have reduced the availability of spawning gravel and rearing habitat in the Upper Sacramento River from Keswick Dam to Red Bluff Diversion Dam, and in the American and Stanislaus Rivers downstream from the Nimbus and Goodwin Dams, respectively. The program shall include preventive measures, such as re-establishment of meander belts and limitations on future bank protection activities, in order to avoid further losses of instream and riparian habitat. Costs associated with implementation of this paragraph shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimburseable Federal expenditure, and 25 percent shall be paid by the State of California.

(14) develop and implement a program which provides for modified operations and new or improved control structures at the Delta Cross Channel and Georgiana Slough during times when significant numbers of striped bass eggs, larvae, and juveniles approach the Sacramento River intake to the Delta Cross Channel or Georgiana Slough. Costs associated with implementation of this paragraph shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(15) construct, in cooperation with the State of California and in consultation with local interests, a barrier at the head of Old River in the Sacramento-San Joaquin Delta to be operated on a seasonal basis to increase the survival of young outmigrating salmon that are diverted from the San Joaquin River to Central Valley Project and State Water Project pumping plants and in a manner that does not significantly impair the ability of local entities to divert water. The costs associated with implementation of this paragraph shall be reimbursed in accordance with the following formula: 37.5 percent shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(16) establish, in cooperation with independent entities and the State of California, a comprehensive assessment program to monitor fish and wildlife resources in the Central Valley to assess the biological results and effectiveness of actions implemented pursuant to this subsection. 37.5 percent of the costs associated with implementation of this paragraph shall be reimbursed as main project features, 37.5 percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(17) develop and implement a program to resolve fishery passage problems at the Anderson-Cottonwood Irrigation District Diversion Dam as well as upstream stranding problems related to Anderson-Cottonwood Irrigation District Diversion Dam operations. Costs associated with implementation of this paragraph shall be allocated 50 percent to the United States as a nonreimbursable expenditure and 50 percent to the State of California.

(18) if requested by the State of California, assist in developing and implementing management measures to restore the striped bass fishery of the Bay-Delta estuary. Such measures shall be coordinated with efforts to protect and restore native fisheries. Costs associated with implementation of this paragraph shall be allocated 50 percent to the United States and 50 percent to the State of California. The United States' share of costs associated with implementation of this paragraph shall be nonreimbursable.

(19) reevaluate existing operational criteria in order to maintain minimum carryover storage at Sacramento and Trinity River reservoirs to protect and restore and anadromous fish of the Sacramento and Trinity Rivers in accordance with the mandates and requirements of this subsection and subject to the Secretary's responsibility to fulfill all project purposes, including agricultural water delivery.

(20) participate with the State of California and other Federal agencies in the implementation of the on-going program to mitigate fully for the fishery impacts associated with operations of the Glenn-Colusa Irrigation District's Hamilton City Pumping Plant. Such participation shall include replacement of the defective fish screens and fish recovery facilities associated with the Hamilton City Pumping Plant. This authorization shall not be deemed to supersede or alter existing authorizations for the participation of other Federal agencies in the mitigation program. Seventy-five percent shall be considered a nonreimbursable Federal expenditure, and 25 percent shall be paid by the State of California.

(21) assist the State of California in efforts to develop and implement measures to avoid losses of juvenile anadromous fish resulting from unscreened

or inadequately screen diversions on the Sacramento and San Joaquin rivers, their tributaries, the Sacramento-San Joaquin Delta, and the Suisun Marsh. Such measures shall include but shall not be limited to construction of screens on unscreened diversions, rehabilitation of existing screens, replacement of existing non-functioning screens, and relocation of diversions to less fishery-sensitive areas. The Secretary's share of costs associated with activities authorized under this paragraph shall not exceed 50 percent of the total cost of any such activity.

(22) provide such incentives as the Secretary determines to be appropriate or necessary, consistent with the goals and objectives of this title, to encourage farmers to participate in a program, which the Secretary shall develop, under which such farmers will keep fields flooded during appropriate time periods for the purposes of waterfowl habitat creation and maintenance and for Central Valley Project yield enhancement; *Provided,* That such incentives shall not exceed $2,000,000 annually, either directly or through credits against other contractual payment obligations, including the pricing waivers authorized under subsection 3405(d) of this title; *Provided further,* That the holder of the water contract shall pass such incentives through to farmers participating in the program, less reasonable contractor costs, if any; *And provided further,* That such water may be transferred subject to section 3405(a) of this title only if the farmer waives all rights to such incentives. This provision shall terminate by the year 2002.

(23) in order to meet Federal trust responsibilities to protect the fishery resources of the Hoopa Valley Tribe, and to meet the fishery restoration goals of the Act of October 24, 1984, Public Law 98-541, provide through the Trinity River Division,

for water years 1992 through 1996, an instream release of water to the Trinity River of not less than three hundred and forth thousand acre-feet per year for the purposes of fishery restoration, propagation, and maintenance and,

(A) by September 30, 1996, the Secretary, after consultation with the Hoopa Valley Tribe, shall complete the Trinity River Flow Evaluation Study currently being conducted by the United States Fish and Wildlife Service under the mandate of the Secretarial Decision of January 14, 1981, in a manner which insures the development of recommendations, based on the best available scientific data, regarding permanent instream fishery flow requirements and Trinity River Division operating criteria and procedures for the restoration and maintenance of the Trinity River Fishery; and

(B) not later than December 31, 1996, the Secretary shall forward the recommendations of the Trinity River Flow Evaluation Study, referred to in subparagraph (A) of this paragraph, to the Committee on Energy and Natural Resources and the Select Committee on Indian Affairs of the Senate and the Committee on Interior and Insular Affairs and the Committee on Merchant Marine and Fisheries of the House of Representatives. If the Secretary and the Hoopa Valley Tribe concur in these recommendations, any increase to the minimum Trinity River instream fishery releases established under this paragraph and the operating criteria and procedures referred to in subparagraph (A) shall be implemented accordingly. If the Hoopa Valley Tribe and the Secretary do not concur, the minimum

Trinity River instream fishery releases established under this paragraph shall remain in effect unless increased by an Act of Congress, appropriate judicial decree, or agreement between the Secretary and the Hoopa Valley Tribe. Costs associated with implementation of this paragraph shall be reimbursable as operation and maintenance expenditures pursuant to existing law.

If the Secretary and the State of California determine that long-term natural fishery productivity in all Central Valley Project controlled rivers and streams resulting from implementation of this section exceeds that which existed in the absence of Central Valley Project facilities, the costs of implementing those measures which are determined to provide such enhancement shall become credits to offset reimbursable costs associated with implementation of this subsection.

(c) SAN JOAQUIN AND STANISLAUS RIVERS. – The Secretary shall, by not later than September 30, 1996:

(1) develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary. Such plan shall be developed in cooperation with the California Department of Fish and Game and in coordination with the San Joaquin River Management Program under development by the State of California; shall comply with

and contain any documents required by the National Environmental Policy Act and contain findings setting forth the basis for the Secretary's decision to adopt and implement the plan as well as recommendations concerning the need for subsequent Congressional action, if any; and shall incorporate, among other relevant factors, the potential contributions of tributary streams as well as the alternatives to be investigated under paragraph (2) of this subsection. During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases. In lieu of such requirement, and until such time as flows of sufficient quantity, quality and timing are provided at and below Gravelly Ford to meet the anadromous fishery needs identified pursuant to such plan, if any, entities who receive water from the Friant Division of the Central Valley Project shall be assessed, in addition to all other applicable charges, a $4 per acre-foot surcharge for all Project water delivered on or before September 30, 1997; a $5 per acre-foot surcharge for all Project water delivered after September 30, 1997 but on or before September 30, 1999; and a $7 per acre-foot surcharge for all Project water delivered thereafter, to be covered into the Restoration Fund.

(2) in the course of preparing the Stanislaus River Basin and Calaveras River Water Use Program Environmental Impact Statement and in consultation with the State of California, affected counties, and

other interests, evaluate and determine existing and anticipated future basin needs in the Stanislaus River Basin. In the course of such evaluation, the Secretary shall investigate alternative storage, release, and delivery regimes, including but not limited to conjunctive use operations, conservation strategies, exchange arrangements, and the use of base and channel maintenance flows, in order to best satisfy both basin and out-of-basin needs consistent, on a continuing basis, with the limitations and priorities established in the Act of October 23, 1962 (76 Stat. 173). For the purposes of this subparagraph, "basin needs" shall include water supply for agricultural, municipal and industrial uses, and maintenance and enhancement of water quality, and fish and wildlife resources within the Stanislaus River Basin as established by the Secretary's June 29, 1981 Record of Decision; and "out-of-basin" needs shall include all such needs outside of the Stanislaus River Basin, including those of the San Francisco Bay/Sacramento-San Joaquin Delta Estuary and those of the San Joaquin River under paragraph (1) of this subsection.

(d) CENTRAL VALLEY REFUGES AND WILDLIFE HABITAT AREAS. – In support of the objectives of the Central Valley Habitat Joint Venture and in furtherance of the purposes of this title, the Secretary shall provide, either directly or through contractual agreements with other appropriate parties, firm water supplies of suitable quality to maintain and improve wetland habitat areas on units of the National Wildlife Refuge System in the Central Valley of California; on the Gray Lodge, Los Banos, Volta, North Grasslands, and Mendota state wildlife management areas; and on the Grasslands Resources Conservation District in the Central Valley of California.

(1) Upon enactment of this title, the quantity and delivery schedules of water measured at the boundaries of each wetland habitat area described in this paragraph shall be in accordance with level 2 of the "Dependable Water Supply Needs" table for those habitat areas as set forth in the Refuge Water Supply Report and two-thirds of the water supply needed for full habitat development for those habitat areas identified in the San Joaquin Basin Action Plan/Kesterson Mitigation Action Plan Report prepared by the Bureau of Reclamation. Such water shall be provided through long-term contractual agreements with appropriate parties and shall be supplemented by the increment of water provided for in paragraph (1) of this subsection; *Provided,* That the Secretary shall be obligated to provide such water whether or not such long-term contractual agreements are in effect. In implementing this paragraph, the Secretary shall endeavor to diversify sources of supply in order to minimize possible adverse effects upon Central Valley Project contractors.

(2) Not later than ten years after enactment of this title, the quantity and delivery schedules of water measured at the boundaries of each wetland habitat area described in this paragraph shall be in accordance with level 4 of the "Dependable Water Supply needs" table for those habitat areas as set forth in the Refuge Water Supply Report and the full water supply needed for full habitat development for those habitat areas identified in the San Joaquin Basin Action Plan/Kesterson Mitigation action Plan Report prepared by the Bureau of Reclamation. The quantities of water required to supplement the quantities provided under paragraph (1) of this subsection shall be acquired by the Secretary in cooperation with the State of California and in consultation with

the Central Valley Habitat Joint Venture and other interests in cumulating increments of not less than ten percent per annum through voluntary measures which include water conservation, conjunctive use, purchase, lease, donations, or similar activities, or a combination of such activities which do not require involuntary reallocations of project yield.

(3) All costs associated with implementation of paragraph (1) of this subsection shall be reimbursable pursuant to existing law. Incremental costs associated with implementation of paragraph (2) of this subsection shall be fully allocated in accordance with the following formula: 75 percent shall be deemed a nonreimbursable Federal expenditure; and 25 percent shall be allocated to the State of California for recovery through direct reimbursements or through equivalent in-kind contributions.

(4) The Secretary may temporarily reduce deliveries of the quantity of water dedicated under paragraph (1) of this subsection up to 25 percent of such total whenever reductions due to hydrologic circumstances are imposed upon agricultural deliveries of Central Valley Project water; *Provided*, That such reductions shall not exceed in percentage terms the reductions imposed on agricultural service contractors. For the purpose of shortage allocation, the priority or priorities applicable to the increment of water provided under paragraph (2) of this subsection shall be the priority or priorities which applied to the water in question prior to its transfer to the purpose of providing such increment.

(5) The Secretary is authorized and directed to construct or to acquire from non-Federal entities such water conveyance facilities, conveyance capacity, and wells as are necessary to implement the requirements of this subsection; *Provided*, That such

authorization shall not extend to conveyance facilities in or around the Sacramento-San Joaquin Delta Estuary. Associated construction or acquisition costs shall be reimbursable pursuant to existing law in accordance with the cost allocations set forth in paragraph (3) of this subsection.

(6) The Secretary, in consultation with the State of California, the Central Valley Habitat Joint Venture, and other interests, shall investigate and report on the following supplemental actions by not later than September 30, 1997:

(A) alternative means of improving the reliability and quality of water supplies currently available to privately owned wetlands in the Central Valley and the need, if any, for additional supplies; and

(B) water supply and delivery requirements necessary to permit full habitat development for water dependent wildlife on one hundred and twenty thousand acres supplemental to the existing wetland habitat acreage identified in Table 8 of the Central Valley Habitat Joint Venture's "Implementation Plan" dated April 19, 1990, as well as feasible means of meeting associated water supply requirements.

(e) SUPPORTING INVESTIGATIONS. – Not later than five years after the date of enactment of this title, the Secretary shall investigate and provide recommendations to the Committee on Energy and Natural Resources of the Senate and the Committees on Interior and Insular Affairs and Merchant Marine and Fisheries of the House on the feasibility, cost, and desirability of developing and implementing each of the following, including, but not

limited to, the impact on the project, its users, and the State of California:

(1) measures to maintain suitable temperatures for anadromous fish survival in the Sacramento and San Joaquin rivers and their tributaries, and the Sacramento-San Joaquin Delta by controlling or relocating the discharge of irrigation return flows and sewage effluent, and by restoring riparian forests;

(2) opportunities for additional hatchery production to mitigate the impacts of water development and operations on, or enhance efforts to increase Central Valley fisheries; *Provided*, That additional hatchery production shall only be used to supplement or to re-establish natural production while avoiding adverse effects on remaining wild stocks;

(3) measures to eliminate barriers to upstream and downstream migration of salmonids in the Central Valley, including but not limited to screening programs, barrier removal programs and programs for the construction or rehabilitation of fish ladders on tributary streams;

(4) installation and operation of temperature control devices at Trinity Dam and Reservoir to assist in the Secretary's efforts to conserve cold water for fishery protection purposes;

(5) measures to provide for modified operations and new or improved control structures at the Delta Cross Channel and Georgiana Slough to assist in the successful migration of anadromous fish; and

(6) other measures which the Secretary determines would protect, restore, and enhance natural production of salmon and steelhead trout in tributary streams of the Sacramento and San Joaquin

Rivers, including but not limited to the Merced, Mokulumne, and Calaveras Rivers and Battie, Butte, Deer, Elder, Mill, and Thomes Creeks.

(f) REPORT ON PROJECT FISHERY IMPACTS. – The Secretary, in consultation with the Secretary of Commerce, the State of California, appropriate Indian tribes, and other appropriate public and private entities, shall investigate and report on all effects of the Central Valley Project on anadromous fish populations and the fisheries, communities, tribes, businesses and other interests and entities that have now or in the past had significant economic, social or cultural association with those fishery resources. The Secretary shall provide such report to the Committee on Energy and Natural Resources of the Senate and the Committees on Interior and Insular Affairs and Merchant Marine and Fisheries of the House of Representatives not later than two years after the date of enactment of this title.

(g) ECOSYSTEM AND WATER SYSTEM OPERATIONS MODELS. – The Secretary, in cooperation with the State of California and other relevant interests and experts, shall develop readily usable and broadly available models and supporting data to evaluate the ecologic and hydrologic effects of existing and alternative operations of public and private water facilities and systems in the Sacramento, San Joaquin, and Trinity River watersheds. The primary purpose of this effort shall be to support the Secretary's efforts in fulfilling the requirements of this title through improved scientific understanding concerning, but not limited to, the following:

(1) a comprehensive water budget of surface and groundwater supplies, considering all sources of inflow and outflow available over extended periods;

(2) related water quality conditions and improvement alternatives, including improved temperature prediction capabilities as they relate to storage and flows;

(3) surface-ground and stream-wetland interactions;

(4) measures needed to restore anadromous fisheries to optimum and sustainable levels in accordance with the restored carrying capacities of Central Valley rivers, streams, and riparian habitats;

(5) development and use of base flows and channel maintenance flows to protect and restore natural channel and riparian habitat values;

(6) implementation of operational regimes at State and Federal facilities to increase springtime flow releases, retain additional floodwaters, and assist in restoring both upriver and downriver riparian habitats;

(7) measures designed to reach sustainable harvest levels of resident and anadromous fish, including development and use of systems of tradeable harvest rights;

(8) opportunities to protect and restore wetland and upland habitats throughout the Central Valley; and

(9) measures to enhance the firm yield of existing Central Valley Project facilities, including improved management and operations, conjunctive use opportunities, development of offstream storage, levee setbacks, and riparian restoration.

All studies and investigations shall take into account and be fully consistent with the fish, wildlife, and habitat protection and restoration measures required by this title or by any other State or Federal law. Seventy-five percent of the costs associated with implementation of this subsection shall be borne by the United States as a nonreimbursable cost; the remaining 25 percent shall be borne by the State of California.

(h) The Secretary shall enter into a binding cost-share agreement with the State of California with respect to the timely reimbursement of costs allocated to the State in this title. Such agreement shall provide for consideration of the value of direct reimbursements, specific contributions to the Restoration Fund, and water, conveyance capacity, or other contributions in-kind that would supplement existing programs and that would, as determined by the Secretary, materially contribute to attainment of the goals and objectives of this title.

SEC. 3407. RESTORATION FUND.

(a) RESTORATION FUND ESTABLISHED. – There is hereby established in the Treasury of the United States the "Central Valley Project Restoration Fund" (hereafter "Restoration Fund") which shall be available for deposit of donations from any source and revenues provided under sections 3404(c)(3), 3405(f), 3406(c)(1), and 3407(d) of this title. Amounts deposited shall be credited as offsetting collections. Not less than 67 percent of all funds made available to the Restoration Fund under this title are authorized to be appropriated to the Secretary to carry out the habitat restoration, improvement and acquisition

(from willing sellers) provisions of this title. Not more than 33 percent of all funds made available to the Restoration Fund under this title are authorized to be appropriated to the Secretary to carry out the provisions of paragraphs 3406(b)(4)-(6), (10)-(18), and (20)-(22) of this title. Monies donated to the Restoration Fund by non-Federal entities for specific purposes shall be expended for those purposes only and shall not be subject to appropriation.

(b) AUTHORIZATION OF APPROPRIATIONS. – Such sums as are necessary, up to $50,000,000 per year (October 1992 price levels), are authorized to be appropriated to the Secretary to be derived from the Restoration Fund to carry out programs, projects, plans, and habitat restoration, improvement, and acquisition provisions of this title. Any funds paid into the Restoration Fund by Central Valley Project water and power contractors and which are also used to pay for the projects and facilities set forth in section 3406(b), shall act as an offset against any water and power contractor cost share obligations that are otherwise provided for in this title.

(c) MITIGATION AND RESTORATION PAYMENTS BY WATER AND POWER BENEFICIARIES. –

(1) To the extent required in appropriation Acts, the Secretary shall assess and collect additional annual mitigation and restoration payments, in addition to the charges provided for or collected under sections 3404(c)(3), 3405(a)(1)(C), 3405(f), and 3406(c)(1) of this title, consisting of charges to direct

beneficiaries of the Central Valley Project under subsection (d) of this section in order to recover a portion or all of the costs of fish, wildlife, and habitat restoration programs and projects under this title.

(2) The payment described in this subsection shall be established at amounts that will result in collection, during each fiscal year, of an amount that can be reasonably expected to equal the amount appropriated each year, subject to subsection (d) of this section, and in combination with all other receipts identified under this title, to carry out the purposes identified in subsection (b) of this section; *Provided,* That, if the total amount appropriated under subsection (b) of this section for the fiscal years following enactment of this title does not equal $50,000,000 per year (October 1992 price levels) on an average annual basis, the Secretary shall impose such charges in fiscal year 1998 and in each fiscal year thereafter, subject to the limitations in subsection (d) of this section, as may be required to yield in fiscal year 1998 and in each fiscal year thereafter total collections equal to $50,000,000 per year (October 1992 price levels) on a three-year rolling average basis for each fiscal year that follows enactment of this title.

(d) ADJUSTMENT AND ASSESSMENT OF MITIGATION AND RESTORATION PAYMENTS. –

(1) In assessing the annual payments to carry out subsection (c) of this section, the Secretary shall, prior to each fiscal year, estimate the amount that could be collected in each fiscal year pursuant to subparagraphs 2(A) and (B) of this subsection. The Secretary shall decrease all such payments on a proportionate basis from amounts contained in the estimate so that an aggregate amount is collected

pursuant to the requirements of paragraph (c)(2) of this section.

(2) The Secretary shall assess and collect the following mitigation and restoration payments, to be covered to the Restoration Fund, subject to the requirements of paragraph (1) of this subsection:

(A) The Secretary shall require Central Valley Project water and power contractors to make such additional annual payments as are necessary to yield, together with all other receipts, the amount required under paragraph (c)(2) of this subsection; *Provided,* That such additional payments shall not exceed $30,000,000 (October 1992 price levels) on a three-year rolling average basis; *Provided further,* That such additional annual payments shall be allocated so as not to exceed $6 per acre-foot (October 1992 price levels) for agricultural water sold and delivered by the Central Valley Project, and $12 per acre-foot (October 1992 price levels) for municipal and industrial water sold and delivered by the Central Valley project; *Provided further,* That the charge imposed on agricultural water shall be reduced, if necessary, to an amount within the probable ability of the water users to pay as determined and adjusted by the Secretary no less than every five years, taking into account the benefits resulting from implementation of this title; *Provided further,* That the Secretary shall impose an additional annual charge of $25 per acre-foot (October 1992 price levels) for Central Valley Project water sold or transferred to any State or local agency or other entity which has not previously been a Central Valley Project customer and which contracts with the Secretary or any other individual or district receiving Central

Valley Project water to purchase or otherwise transfer any such water for its own use for municipal and industrial purposes, to be deposited in the Restoration Fund; *And Provided further,* That upon the completion of the fish, wildlife, and habitat mitigation and restoration actions mandated under section 3406 of this title, the Secretary shall reduce the sums described in paragraph (c)(2) of this section to $35,000,000 per year (October 1992 price levels) and shall reduce the annual mitigation and restoration payment ceiling established under this subsection to $15,000,000 (October 1992 price levels) on a three-year rolling average basis. The amount of the mitigation and restoration payment made by Central Valley Project Water and power users, taking into account all funds collected under this title, shall, to the greatest degree practicable, be assessed in the same proportion, measured over a ten-year rolling average, as water and power users' respective allocations for repayment of the Central Valley Project.

(e) FUNDING TO NON-FEDERAL ENTITIES. – If the Secretary determines that the State of California or an agency or subdivision thereof, an Indian tribe, or a nonprofit entity concerned with restoration, protection, or enhancement of fish, wildlife, habitat, or environmental values is able to assist in implementing any action authorized by this title in an efficient, timely, and cost effective manner, the Secretary is authorized to provide funding to such entity on such terms and conditions as he deems necessary to assist in implementing the identified action.

(f) RESTORATION FUND FINANCIAL REPORTS. – The Secretary shall, not later than the first full fiscal year after

enactment of this title, and annually thereafter, submit a detailed report to the Committee on Energy and Natural Resources and the Committee on Appropriations of the Senate, and the Committee on Interior and Insular Affairs, the Committee on Merchant Marine and Fisheries, and the Committee on Appropriations of the House of Representatives. Such report shall describe all receipts to and uses made of monies within the Restoration Fund and the Restoration Account during the prior fiscal year and shall include the Secretary's projection with respect to receipts to and uses to be made of the finds during the next upcoming fiscal year.

SEC. 3408. ADDITIONAL AUTHORITIES.

(a) REGULATIONS AND AGREEMENTS AUTHORIZED. – The Secretary is authorized and directed to promulgate such regulations and enter into such agreements as may be necessary to implement the intent, purposes and provisions of this title.

(b) USE OF ELECTRICAL ENERGY. – Electrical energy used to operate and maintain facilities developed for fish and wildlife purposes pursuant to this title, including that used for groundwater development, shall be deemed as Central Valley Project power and shall, if reimbursable, be repaid in accordance with Reclamation law at a price not higher than the lowest price paid by or charged to other Central Valley Project contractors.

(c) CONTRACTS FOR ADDITIONAL STORAGE AND DELIVERY OF WATER. – The Secretary is authorized to enter into contracts pursuant to Reclamation law and this title with any Federal agency, California water user or water

agency, State agency, or private nonprofit organization for the exchange, impoundment, storage, carriage, and delivery of Central Valley Project and non-project water for domestic, municipal, industrial, fish and wildlife, and any other beneficial purpose, except that nothing in this subsection shall be deemed to supersede the provisions of section 103 of Public Law 99-546 (100 Stat. 3051).

(d) USE OF PROJECT FACILITIES FOR WATER BANKING. – The Secretary, in consultation with the State of California, is authorized to enter into agreements to allow project contracting entities to use project facilities, where such facilities are not otherwise committed or required to fulfill project purposes or other Federal obligations, for supplying carry-over storage of irrigation and other water for drought protection, multiple-benefit credit-storage operations, and other purposes. The use of such water shall be consistent with and subject to State law. All or a portion of the water provided for fish and wildlife under this title may be banked for fish and wildlife purposes in accordance with this subsection.

(e) LIMITATION ON CONSTRUCTION. – This title does not and shall not be interpreted to authorize construction of water storage facilities, nor shall it limit the Secretary's ability to participate in water banking or conjunctive use programs.

(f) ANNUAL REPORTS TO CONGRESS. – Not later than September 30 of each calendar year after the date of enactment of this title, the Secretary shall submit a detailed report to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs and the Committee on Merchant

Marine and Fisheries of the House of Representatives. Such report shall describe all significant actions taken by the Secretary pursuant to this title and progress toward achievement of the intent, purposes and provisions of this title. Such report shall include recommendations for authorizing legislation or other measures, if any, needed to implement the intent, purposes and provisions of this title.

(g) RECLAMATION LAW. – This title shall amend and supplement the Act of June 17, 1902, and Acts supplementary thereto and amendatory thereof.

(h) LAND RETIREMENT. –

(1) The Secretary is authorized to purchase from willing sellers land and associated water rights and other property interests identified in paragraph (h)(2) which receives Central Valley Project water under a contract executed with the United States, and to target such purchases to areas deemed most beneficial to the overall purchase program, including the purposes of this title.

(2) The Secretary is authorized to purchase, under the authority of paragraph (h)(i), and pursuant to such rules and regulations as may be adopted or promulgated to implement the provisions of this subsection, agricultural land which, in the opinion of the Secretary –

(A) would, if permanently retired from irrigation, improve water conservation by a district, or improve the quality of an irrigation district's agricultural wastewater and assist the district in implementing the provisions of a water conservation plan approved under section 210 of the Reclamation Reform Act of 1982 and

agricultural wastewater management activities developed pursuant to recommendations specific to water conservation, drainage source reduction, and land retirement contained in the final report of the San Joaquin Valley Drainage Program (September, 1990); or

(B) are no longer suitable for sustained agricultural production because of permanent damage resulting from severe drainage or agricultural wastewater management problems, groundwater withdrawals, or other causes.

(i) WATER CONSERVATION. –

(1) The Secretary is authorized to undertake, in cooperation with Central Valley Project irrigation contractors, water conservation projects or measures needed to meet the requirements of this title. The Secretary shall execute a cost-sharing agreement for any such project or measure undertaken. Under such agreement, the Secretary is authorized to pay up to 100 percent of the costs of such projects or measures. Any water saved by such projects or measures shall be governed by the conditions of subparagraph 3405(a)(1) (A) and (J) of this title, and shall be made available to the Secretary in proportion to the Secretary's contribution to the total cost of such project or measure. Such water shall be used by the Secretary to meet the Secretary's obligations under this title, including the requirements of paragraph 3406(b)(3). Such projects or measures must be implemented fully by September 30, 1999.

(2) There are authorized to be appropriated through the end of fiscal year 1998 such sums as may be necessary to carry out the provisions of this subsection. Funds appropriated under this subsection shall be a nonreimbursable Federal expenditure.

(j) PROJECT YIELD INCREASE. – In order to minimize adverse effects, if any, upon existing Central Valley Project water contractors resulting from the water dedicated to fish and wildlife under this title, and to assist the State of California in meeting its future water needs, the Secretary shall, not later than three years after the date of enactment of this title, develop and submit to the Congress, a least-cost plan to increase, within fifteen years after the date of enactment of this title, the yield of the Central Valley Project by the amount dedicated to fish and wildlife purposes under this title. The plan authorized by this subsection shall include, but shall not be limited to a description of how the Secretary intends to use the following options:

(1) improvements in, modification of, or additions to the facilities and operations of the project;

(2) conservation;

(3) transfers;

(4) conjunctive use;

(5) purchase of water;

(6) purchase and idling of agricultural land; and

(7) direct purchase of water rights.

Such plan shall include recommendations on appropriate cost-sharing arrangements and shall be developed in a manner consistent with all applicable State and Federal law.

(k) Except as specifically provided in this title, nothing in this title is intended to alter the terms of any

final judicial decree confirming or determining water rights.

SEC. 3409. ENVIRONMENTAL REVIEW.

Not later than three years after the date of enactment of this title, the Secretary shall prepare and complete a programmatic environmental impact statement pursuant to the National Environmental Policy Act analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts. Such statement shall consider impacts and benefits within the Sacramento, San Joaquin, and Trinity River basins, and the San Francisco Bay/Sacramento-San Joaquin River Delta Estuary. The cost of the environmental impact statement described in this section shall be treated as a capital expense in accordance with Reclamation law.

SEC. 3410. AUTHORIZATION OF APPROPRIATIONS.

There are authorized to be appropriated such sums as may be necessary to carry out the provisions of this title. Funds appropriated under this title shall remain available until expended without fiscal year limitation.

SEC. 3411. COMPLIANCE WITH STATE WATER LAW AND COORDINATED OPERATIONS AGREEMENT.

(a) Notwithstanding any other provision of this title, the Secretary shall, prior to the reallocation of water from any purpose of use or place of use specified within

applicable Central Valley Project water rights permits and licenses to a purpose of use or place of use not specified within said permits or licenses, obtain a modification in those permits and licenses, in a manner consistent with the provisions of applicable State law, to allow such change in purpose of use or place of use.

(b) The Secretary, in the implementation of the provisions of this title, shall fully comply with the United States' obligations as set forth in the "Agreement Between the United States of America and the Department of water Resources of the State of California for Coordinated Operation of the Central Valley Project and the State Water Project" dated May 20, 1985, and the provisions of Public Law 99-546; and shall take no action which shifts an obligation that otherwise should be borne by the Central Valley project to any other lawful water rights permittee or licensee.

SEC. 3412. EXTENSION OF THE TEHAMA-COLUSA CANAL SERVICE AREA.

The first paragraph of section 2 of the Act of September 26, 1950 (64 Stat. 1036), as amended by the act of august 19, 1967 (81 Stat. 167), and the Act of December 22, 1980 (94 Stat. 3339), authorizing the Sacramento Valley Irrigation Canals, Central Valley Project, California, is further amended by striking "Tehama, Glenn, and Colusa Counties, and those portions of Yolo County within the boundaries of the Colusa County, Dunnigan, and Yolo-Zamora water districts or" and inserting "Tehama, Glenn, Colusa, Solano, and Napa Counties, those portions of Yolo County within the boundaries of Colusa County

Water District, Dunnigan Water District, Yolo-Zamore Water District, and Yolo County Flood Control and Water Conservation District, or".

Reclamation Act of 1902
43 U.S.C. § 383. Vested rights and State laws unaffected

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Endangered Species Act
16 U.S.C. § 1536. Interagency cooperation

[ESA § 7]

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal

agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered species and threatened species listed pursuant to section 1533 of this title.

(2) Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

(3) Subject to such guidelines as the Secretary may establish, a Federal agency shall consult with the Secretary on any prospective agency action at the request of, and in cooperation with, the prospective permit or license applicant if the applicant has reason to believe that an endangered species or a threatened species may be present in the area affected by his project and that implementation of such action will likely affect such species.

(4) Each Federal agency shall confer with the Secretary on any agency action which is likely to jeopardize

the continued existence of any species proposed to be listed under section 1533 of this title or result in the destruction or adverse modification of critical habitat proposed to be designated for such species. This paragraph does not require a limitation on the commitment of resources as described in subsection (d) of this section.

* * *

(d) Limitation on commitment of resources

After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section.

* * *

BIOLOGICAL OPINION

Agency: Mid-Pacific Region, Bureau of Reclamation.

Activity: Central Valley Project, 1992 Operations.

Consultation Conducted By: Southwest Region, National Marine Fisheries Service.

Date Issued: FEB 14 1992

BACKGROUND

On February 26, 1991, the National Marine Fisheries Service (NMFS) requested the U.S. Bureau of Reclamation (Bureau), Department of the Interior, to formally consult with NMFS under section 7 of the Endangered Species Act (ESA) to determine whether its operation of the Central Valley Project (CVP) jeopardizes the continued existence of the threatened Sacramento River winter-run chinook salmon. On April 11, 1991, the Bureau's Mid-Pacific Regional Office agreed to NMFS' request for formal consultation.

Previously, the Bureau informally consulted with NMFS about the effects on winter-run chinook salmon of construction and operation of the Shasta Outflow Temperature Control preferred alternative. However, when NMFS informed the Bureau that adoption and implementation of the preferred alternative, the shutter device, would not likely adversely affect winter-run chinook salmon, it also requested formal consultation on operation of the CVP because even with the device in place, temperature conditions could rise during some years and adversely affect winter-run chinook salmon.

Since April 1991, NMFS and the Bureau have been meeting to discuss the status of CVP operations, proposed 1992 operations, and mitigation of CVP impacts to winter-run chinook salmon. The Bureau has been developing a document which describes basic CVP operating criteria and decision-making strategies entitled Central Valley Project Operations Criteria and Plan (CVP-OCAP). Following is the stated objective of the criteria and plan:

> "Develop operational plan, including the identification of alternative operations, strategies, and criteria to meet legislative, legal, regulatory, and agreement requirements. Near-term objective to provide operations information for Endangered Species Act (ESA), Section 7, consultation. Long-term objective to integrate Central Valley Project operations plan with the proposed Central Valley Project Water Management Program." (BOR 1991)

NMFS and the Bureau agreed that the scope of this consultation would include operations of all CVP units, except the Friant Unit. Operations of the Friant Unit do not directly affect winter-run chinook salmon, and the indirect impacts of Friant operations are addressed in the discussion of the Delta Division operations. Areas of particular concern regarding impacts to winter-run chinook salmon include the operation of the Shasta Division, Trinity Division, Red Bluff Diversion Dam, and Delta Division. Also, the Bureau coordinated the development of the biological assessment with the State of California (State) Department of Water Resources which is responsible for the operation of the State Water Project.

The Bureau's scheduled completion of its portion of the consultation, the biological assessment, was set for November 1991 in order for NMFS to issue a biological opinion before the Bureau made its annual February 15 forecast for water deliveries. However, the Bureau announced that it would not complete the final CVP operations plan and biological assessment until February 15. Therefore, NMFS informed the Bureau that it would need to take certain measures (in the absence of a completed biological opinion) to prevent the irretrievable or irreversible commitment of resources which could result in the taking of winter-run chinook salmon. NMFS and the Bureau agreed that this initial consultation would include only CVP operations in 1992, but consultation would continue on the long-term impacts, and a new opinion would be issued for future operations.

During this consultation with the Bureau, NMFS developed biological criteria for the CVP facilities and operations that would protect Sacramento winter-run chinook salmon. These biological criteria were prepared to assist the Bureau in developing an operation plan that would minimize or avoid impacts to winter-run chinook salmon.

Description of Central Valley Project

The Central Valley Project in California, which is administered by the Bureau of Reclamation in the Department of the Interior, is one of the nation's major water development projects, and, extends from the Cascade Range in the north to the Kern River in the south (Figure 1) The Central Valley Basin includes two major watersheds, the Sacramento River on the north and the San Joaquin River

on the south plus the Tulare Lake Basin. The combined watersheds extend nearly 500 miles in a northwest-southeast direction. The two river systems join at the Sacramento-San Joaquin Delta, flow through Suisun Bay and Carquinez Straits into San Francisco Bay, and past the Golden Gate to the Pacific Ocean.

* * *

will be subject to physiological stress and are likely to spawn further downstream where lethal temperature conditions are projected to predominate. Winter-run fry and juveniles of the 1992 year-class will be subject to increased levels of predation by passage under the gates at the dam before December 1. Losses due to predation may range from 16 to 55 percent during passage under the gates at Red Bluff Diversion Dam (Vogel et al. 1988).

Downstream juvenile migrants from both the 1991 and 1992 year-classes of winter-run chinook salmon will experience significantly reduced survival rates by diversion into the Sacramento-San Joaquin Delta at the Delta Cross Channel. Smolts diverted into the central and southern Delta will be subject to a number of adverse conditions including reverse flows, predation, unscreened diversions, higher water temperatures, poor water quality, and entrainment by the water export facilities. Smolts diverted into Montezuma Slough by the operation of the Suisun Marsh Salinity Control Structure will be subject to similar adverse conditions.

Based on an assessment of the impacts discussed in this opinion, NMFS concludes that the proposed 1992 operation of the CVP by the Bureau is likely to jeopardize the

continued existence of Sacramento River winter-run chinook salmon.

REASONABLE AND PRUDENT ALTERNATIVES

NMFS is providing the following reasonable and prudent alternative that can be implemented by the Bureau to avoid jeopardy to winter-run chinook salmon as a result of the proposed operations of the Central Valley Project in 1992. This alternative was identified during the formal consultation process which included not only the Bureau, but the U.S. Fish and Wildlife Service, the California Department of Fish and Game, California Department of Water Resources and the State Water Resources Control Board. This reasonable and prudent alternative includes only actions that were identified during formal consultation and that can be implemented in a manner consistent with the intended purpose of the proposed action. The discussion includes the anticipated benefits and possible consequences of these actions.

With the implementation of the reasonable and prudent alternative, NMFS has concluded that the short-term operation of the Central Valley Project during 1992 is not likely to jeopardize the continued existence of winter-run chinook salmon. Under the severe drought conditions predicted for the 1992 season, NMFS is unable to provide other recommendations in addition to this reasonable and prudent alternative to further mitigate harm to the winter-run chinook salmon.

Shasta/Trinity Divisions

1. **Maintain a minimum flow of 3,000 Cfs from Keswick Dam to the Sacramento River to provide for safe rearing and downstream passage of juvenile winter-run chinook salmon.**

On February 1, the Bureau reduced Keswick Dam releases to the upper Sacramento River to 3,000 cfs. This release is believed to be the minimum streamflow adequate to safely protect rearing and emigrating juvenile winter-run chinook salmon from stranding in side channels and other areas in the upper Sacramento River. It will also serve to conserve water in Shasta Lake so that temperature protection can be provided to winter-run chinook salmon in the summer and fall months.

2. **Maintain daily average water temperature in the Sacramento River at no more than 56°F throughout the 1992 spawning grounds of the winter-run chinook salmon between Keswick Dam and Ball's Ferry from April 15 through September 30, and at no more than 60°F from October 1 through October 31.**

To survive, winter-run chinook eggs and pre-emergent fry require water temperatures at or below 56°F. The Bureau and the State Department of Water Resources have identified and are expected to implement extraordinary measures to achieve this temperature goal. Suitable temperatures in the winter-run chinook salmon spawning area of the upper Sacramento River can only be accomplished by maximizing carry-over storage in Shasta Reservoir and releasing the cold hypolimnetic water from the

low level outlets during the summer and early fall. Use of the cold water reserves in Shasta Lake will require the Bureau to forego the opportunity to generate power at the Shasta Powerplant during the critical incubation period of winter-run chinook salmon.

To maximize the quantity of cold water reserves available in Shasta Reservoir, the Bureau is expected to reduce water deliveries to contractors throughout the Sacramento River Basin, meet only relaxed D-1485 water quality standards in the Delta (from 150 ppm at Rock Slough to 250 ppm), reduce Wilkins Slough flows to 2,300 cfs, and incur a water debt under the Coordinated Operations Agreement to achieve the maximum effect from banking water in Shasta. NMFS will not preclude the Bureau from repaying this debt under the Coordinated Operations Agreement to the Department of Water Resources once the critical temperature period has passed in 1992 for winter-run chinook salmon.

Despite these unprecedented measures, the limited quantity of available cold water reserves will not allow adequate spawning temperatures to be achieved as far downstream as Red Bluff Diversion Dam. Therefore, actions to draw winter-run adults further upstream towards Keswick Dam will be attempted by the Bureau before initiation of spawning activities. These actions will likely include the artificial warming of the upper Sacramento River during April and May by release of warm water from Whiskeytown Reservoir or Shasta Dam top-level bypass, and an extended period of raised gates at Red Bluff Diversion Dam. Sudden increases in river temperature have been shown to increase the upstream migration activity in winter-run chinook (CH2M Hill

1992). If spawning winter-run chinook salmon can be drawn further upstream towards Keswick Dam, spawning will occur in areas where adequate temperatures can be maintained throughout the critical incubation season, and mortality to egg and preemergent fry can be minimized or eliminated.

Sacramento River Division

1. **Maintain the gates of the Red Bluff Diversion Dam in the raised position through May 1 or later to provide unimpeded upstream passage for the 1992 winter-run spawning population.**

Since early December, the gates at Red Bluff Diversion Dam have been raised to a full open position for unimpeded passage of adult winter-run chinook to the upper Sacramento River. By leaving the dam gates open for a period beyond the proposed closure date of April 1, the number of winter-run chinook salmon passing Red Bluff Diversion Dam will increase substantially. If the gates remain open to May 1, an additional 23 percent of the spawning run will not be subject to blockage and delay at Red Bluff Diversion Dam. Extending the period beyond May 1 will benefit the latter portion of the upstream migrants. Based on the average run-timing, it can be expected that 83 percent of the winter-run should have passed the dam by May 1. The combination of unimpeded passage at Red Bluff Diversion Dam, low streamflow conditions, and possible warm-water releases should stimulate spawning salmon to migrate further upstream towards Keswick Dam. All of these actions are necessary during 1992 because of the limitations on the

Bureau to provide suitable temperature conditions in all of the spawning habitat during the spawning and incubation period.

The extended period of raised gates at Red Bluff Diversion Dam should not impact Bureau water delivery requirements during 1992. Extremely critical water supply conditions in 1992 will prohibit the normal delivery of water to agriculture. The Bureau will be capable of meeting minimal irrigation demands in the Tehama-Colusa Canal and Corning Canal service areas with the current 125-cfs pumping capacity at Red Bluff Diversion Dam and water that is available through the Orland Project.

2. **Raise the gates of the Red Bluff Diversion Dam on November 1 or earlier to provide for unimpeded downstream passage of winter-run juveniles.**

By removing the gates of Red Bluff Diversion Dam 1 month earlier, an additional number of winter-run chinook salmon fry and juveniles will be able to pass downstream without incurring any of the problems associated with the lowered gates or fish facilities at the Tehama-Colusa Canal. The actual percentage of emigrants benefiting from this action depends on hydrological and streamflow conditions during the fall months.

Again, the extended period of raised gates at Red Bluff Diversion Dam should not impact the water delivery requirements of the Bureau during 1992. The irrigation season ends by November, and the Bureau will be able to

meet minimal irrigation demands with current pumping capacity.

Delta Division

1. **Maintain the Delta Cross Channel Gates in the closed position from February 1 through May 1 to reduce the diversion of juvenile winter-run outmigrants into the Delta.**

As of February 3, the gates of the Delta Cross Channel have been closed to mitigate the impacts of Bureau and State Delta operations on winter-run chinook salmon. Juveniles migrating downstream will remain in the Sacramento River channel at Walnut Grove when the Cross Channel gate is closed. Evidence suggests that March and April will be the primary period of outmigration through the Delta for the 1991 year-class of winter-run chinook salmon. This action will result in the exposure of fewer fish to adverse conditions in central Delta waterways and the impacts associated with the pumping plants.

At Georgiana Slough, some fish will continue to be diverted into the central Delta, but it is a significantly smaller proportion than would be diverted by the open Delta Cross Channel during low flow conditions. Under low Delta outflow conditions when the Cross Channel gates are open, the majority of Sacramento River discharge can be drawn into the Delta. Since Georgian Slough is a natural ungated channel with limited hydraulic capacity for diversion, the proportion of Sacramento River discharge passing through Georgiana Slough is limited to a maximum of 35 percent by the physical capacity of the

channel. Survival of outmigrants through the Sacramento-San Joaquin Delta will improve by maintaining the juveniles in the Sacramento River channel at the Delta Cross Channel.

To maintain Delta water quality standards with the Cross Channel gates closed, both the State and the Bureau will be required to reduce Delta water export operations. The Bureau estimates this action will result in pumping reductions of about 1,000 cfs per day and an export loss of 149,000 AF from February 1 through May 1 (CVP and State Water Project combined).

2. a. **Close the Suisun Marsh Salinity Control Gates, from March I through April 15 to eliminate the diversion of juvenile outmigrants into Montezuma Slough**

   or

   b. **Provide NMFS with written documentation that during the operation of the Suisun Marsh Salinity Control Gates, no water will be diverted from Montezuma Slough through unscreened diversions during the period of March 1 to April 15.**

Action 2(a) would eliminate the diversion of winter-run juveniles into Montezuma Slough during the anticipated period of peak migration during 1992, and thus they would not be exposed to adverse conditions at the Suisun Marsh Salinity Control Structure and within Montezuma Slough. Closure of the gates will maintain fish and river flow within the Sacramento River channel and the survival of downstream migrating juveniles through the

Delta would be expected to increase. Few, if any, upstream migrant adult winter-run will be attracted into the western entrance of Montezuma Slough due to the absence of Sacramento River water in Montezuma Slough.

Salinities within Suisun Marsh are expected to increase as a result of this action. Saline conditions may impact the growth of flora that rely on brackish conditions. Managed wetlands will be adversely affected, however, the resulting loss of wintering waterfowl food production can be minimized by scheduling the leeching and soak cycles with the period of gate closures. A potential auxiliary benefit which may result from the nonoperation of the control structure is the savings of water in Sacramento Basin reservoirs;

Action 2(b) has been proposed by DWR and CDFG, however, successful implementation of this alternative can not be assured of at this time. Many of the diversions within Montezuma Slough are owned and operated by the CDFG, however, DWR will be required to solicit cooperation from many private parties within the slough during this same time period in order to ensure that they do not divert water. If DWR can provide written documentation to the NMFS that the operation of unscreened water diversions in Montezuma Slough will be terminated from March 1 to April 15, this action will substitute for the closure of the gates outline in 2 (a). Operation of the salinity control structure will divert more winter-run into Montezuma Slough, however, curtailment of unscreened water diversions is expected to minimize losses within the slough. Implementation of this action

will provide protection for winter-run during the primary outmigration period of the 1991 year-class.

3. **Curtail operation of unscreened water diversions within Montezuma Slough and in other locations from March 1 to April 15 to protect winter-run chinook salmon outmigrants.**

The California Department of Fish and Game and California Department of Water Resources have proposed curtailing operation of unscreened water diversions in Montezuma Slough from March 1 to April 15 to protect 1991 winter-run chinook salmon that are migrating downstream. Many of the diversions within Montezuma Slough are owned and operated by the Department of Fish and Game which has offered to solicit cooperation from private parties within the slough during this time. NMFS encourages this cooperative approach to minimize loss of winter-run chinook salmon at unscreened private water diversions. The proposal by the two State agencies targets the expected primary outmigration period for the 1991 year-class which will benefit survival of winter-run chinook salmon through the Delta.

4. **Establish a working operations and management group to coordinate and ensure full implementation of the reasonable and prudent alternative and to manage the consequences of its implementation.**

A working group consisting of representatives from NMFS, the Bureau, FWS, and State agencies including the Department of Water Resources, Department of Fish and

Game, and the Water Resources Control Board should be established to assist in implementing the reasonable and prudent alternative. The main objective of this working group would be to ensure that the reasonable and prudent alternative is fully achieved while managing the consequences of its implementation.

REINITIATION OF CONSULTATION

Reinitiation of formal consultation is required if there is discretionary Federal involvement or control over the action and if (1) the amount or extent of taking specified in any incidental take statement is exceeded; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the action is subsequently modified in a manner that causes an effect to the listed species that was not considered in the biological opinion; or (4) a new species is listed or critical habitat designated that may be affected by the action.

[LOGO]
UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
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300 S. Ferry Street
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November 1, 1991 F/SWR3:JRL

Roger Patterson
Regional Director
Bureau of Reclamation
Mid-Pacific Region
2800 Cottage Way
Sacramento, CA 95825-1898

Dear Mr. Patterson:

This is to follow up on your request for our concurrence with your determination that Friant contract renewals will not affect the winter-run of chinook salmon and on the subsequent discussions between Dan Fults (Deputy Regional Director, Bureau of Reclamation Mid-Pacific Region) and Jim Lecky (Chief Protected Species Management Division National Marine Fisheries Service Southwest Region) regarding the Friant contracts. While we disagree with the Bureau's determination that renewal of Friant contracts are not likely to affect winter-run adversely, for the reasons discussed below, we do not believe a formal consultation on Friant contract renewals is necessary.

While the Friant division of the Central Valley Project (CVP) is remote from the winter-run chinook in the Sacramento River, the interrelated export of Sacramento River water through the Delta Mandota Canal does adversely

affect the winter-run of chinook salmon. This diversion contributes to the entrainment of winter-run juveniles into the delta through the delta cross channel and other channels that lead to the Federal pumps at Tracy, California. The California Department of Fish and Game has documented reduced survival rates for juvenile salmon that are entrained into the central delta versus those that stay in the river channel on their way to sea. However, the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureaus's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts.

In addition, we are consulting with the Army Corps of Engineers (COE) on the impacts of the State Water Project. The background material being prepared by your office on the operations criteria of the CVP and the Biological Assessment being prepared by California Department of Water Resources (for use in the consultation with the COE) should provide us with sufficient information to analyze the impacts of the CVP, including delta exports on winter-run chinook. We will discuss these impacts in the biological opinions that result from the ongoing consultations. If the results of these consultations indicate that delta exports need to be modified, we will present recommendations to the Bureau and/or the State as appropriate.

We have reviewed the language the Bureau is incorporating in the renewed contracts as paragraph 14 "Compliance with Reclamation Laws – Modification of Contract" and agree that to the extent it protects the Bureau from

making any irreversible or irretrievable commitment of resources that would foreclose the Bureau's ability to develop or implement any alternatives to reduce the adverse impacts that result from delta exports, it satisfies the provisions of the Endangered Species Act on this point.

Given that the issue of delta exports is being addressed in ongoing consultations and that the Bureau is conditioning renewed Friant contracts so they may be modified to compensate for changes in delta exports if needed, we see no need to consult on Friant contract renewals at this time.

However we may request initiation of the consultation process if: 1) new information becomes available revealing effects of the project on listed species that were not previously considered; 2) the project is subsequently modified in a manner that causes an effect to listed species that was not considered; 3) or if a new species or critical habitat is designated that may be affected by the project. If you have questions regarding this letter, please contact Jim Lecky, Chief Protected Species Management Division, at FTS 795-6664.

Sincerely,

/s/ E. C. Fullerton
E. C. Fullerton
Regional Director

cc: NMFS – Foster
FWS – White
CDFG – Bontadelli

APR 13 1988

MP-410
511.

To: Project Leader, Office of Endangered Species Fish and Wildlife Service, Sacramento, CA

From: Regional Supervisor of Water and Power Resources Management

Subject: Request for Species List – Friant-Kern Service Area

Pursuant to Section 7(c) of the Endangered Species Act, the Bureau of Reclamation hereby requests a listing of threatened and endangered species which may be located in the project area.

The Bureau is currently preparing an environmental assessment on the renegotiation of contracts for the contractors in the Friant-Kern Unit (general map attached – unit outlined in yellow). We are in need of an endangered and threatened, species list for inclusion and evaluation in that document.

We have included a partial list of species, but request an update, Please provide this office with a listing of any federally or state listed or candidate threatened endangered species within the boundary depicted.

Federally listed and proposed endangered, threatened and/or rare species and candidate species that may occur in the area of the Friant-Kern Unit:

Listed Species

mammal

San Joaquin kit fox, *Vulpes macrotis martica* (E)

birds

Bald eagle, *Haliaeetus leueecephalus* (E)

American paregrine falcon, *Falco peregrinus anatum* (E)

reptile

Blunt-nosed leopard lizard, *Gambelia silus* (E)

Candidate Species

Plant

San Joaquin saltbush, *Atriplex patula* subsp. *spicata* (2)

State Listed

Mammals

San Joaquin antelope squirrel, *Illegible nelsoni* (R)

Giant Kangaroo rat, *Dipodomys ingens* (E)

Fresno kangaroo rat, *Dipodomys nitatoides exilis* (E)

E – Endangered, R – Rare, 2 – Category 2: Taxa for which existing information indicated may warrant listing, but for which substantial biological information to support a proposed rule is lacking.

/s/ James N. Moore

Attachment

I. SUMMARY

BACKGROUND

The Friant-Kern Unit (FKU) was authorized as an integral part of the Central Valley project (CVP), California. CVP was established as a coordinated operation for the beneficial use of available water in surface reservoirs, streams, and canals in conjunction with ground-water supplies. CVP reservoir operations are coordinated to gain maximum yields and to accomplish water deliveries to the main river channels and project canals in the most efficient and economical manner possible.

The main project features include Friant Dam (completed in 1944), Friant-Kern Canal (1951 completion) and the Madera Canal (1945 completion). Currently, the project services 28 contractors; 23 from the Friant-Kern Canal, 3 from Madera Canal, and 2 who divert water directly from Millerton Lake (Friant Dam impoundment). The service area is fully developed with a 1985 total irrigable acreage of 1,073,218 receiving CVP water. Crops grown in the area include field crops (alfalfa, silage, and pasture), cereal grains (wheat, corn, and barley), vegetables (potatoes), fruits (citrus, grapes, olives, peaches, and plums), and nuts (almonds and walnuts).

The Bureau of Reclamation has existing contracts with the Friant Unit water districts to deliver available water for agricultural and municipal-industrial uses. A detailed list of contractors and their water needs is included in the appendix. Those contracts will terminate from 1989 through 2026. The system has operated over the last 40 years in accordance with the water service

contracts, Reclamation law and the water policy statement of April 11, 1975.

PURPOSE AND NEED

The purpose of this document is to evaluate the water allocation options available concerning the CVP's FKU.

The terms of most existing contracts expire during the 1989-1997 period; one in 1989, four in 1990, six in 1991, four in 1992, nine in 1995, and one in 1997. There are also two contracts which expire later – one in 2006 and the other in 2026.

Prior to the expiration of these contracts, the Bureau is evaluating available options for managing the available water, which is now used by the FKU for agricultural purposes. These contracts were executed for a period of 40 years in accordance with Section 9 of the Act of August 4, 1939 (53 Stat. 1187).

II. ALTERNATIVES, INCLUDING THE PROPOSED ACTION

INTRODUCTION

In order to evaluate a full range of potential water allocation options for the existing available water, four alternatives will be investigated.

This document will utilize the existing conditions for the baseline environmental comparison of alternatives. This baseline will be used instead of the "No Action" alternative, which was included to meet the requirements

of the National Environmental Policy Act (NEPA), but does not represent baseline data.

Also of significant note is the proposed action which is actually a continuation of the existing contract, but with minor changes included for water rates, carryover and use of flood waters. The core contract of the proposed action will be utilized to contrast to the potential water allocation options. The individual contracts will vary somewhat as they will deal with the specifics for each contractor. These specifics will include water quantities, water delivery and diversion locations, and water ordering.

The analysis in this document assumes that there will be no effect on the Delta Export quantities regardless of the selected alternative. Thus any action taken in the Friant-Kern area would not alter the Environmental Impact analysis for Delta Export, which is currently underway.

ALTERNATIVE A – RENEGOTIATE FRIANT-KERN CONTRACTS (PROPOSAL)

This alternative proposes to renegotiate the FKU's contracts as they terminate. The proposed contract would not change the functions, operations or maintenance of the existing facilities, but would include stipulations concerning "Section 215" water. Section 215 water is that quantity of water in excess of storage capacities (unmanaged floodflows) which must be utilized when available. During such short, high runoff periods, the majority of the water will flow down the San Joaquin River, but a portion of this water will be made available

to lands within the FKU's boundaries – including excess lands. This stipulation allows the contractors to use those large quantities of water in the Bureau's CVP service area and the applied water will, in part, aid in ground-water recharge for later use, if needed. This action will also aid in the dispersal of floodwater.

Also of significant note is that according to the needs analysis (appendix, Exhibit 1), the surface water (stored) requirements may be reduced through the inclusion of ground-water "safe yield" use.

ALTERNATIVE B – NO ACTION – ALLOW EXISTING CONTRACTS TO EXPIRE

This alternative proposes no action regarding the existing contracts so they would terminate without renewals or renegotiations. The Friant-Kern operational facilities would remain in place, but water deliveries from Millerton Reservoir would discontinue as contracts expire. The primary purposes of the reservoir and canals would become flood control, power generation and providing municipal/industrial supplies. The available reservoir recreational opportunities would remain, but operational modifications may substantially alter the current situation.

Implementation of this alternative would compel the Friant-Kern contractors to utilize floodflows and other water supplies (ground water, Corps of Engineers reservoirs and the Delta Export) in order to continue their services. Depending on the adequacy of alternative water sources, it is likely that growers would be forced to modify their agricultural practices and crop patterns. It is

expected that most of the agriculture would revert to pasture land instead of crop land.

ALTERNATIVE C – REALLOCATE AVAILABLE MILLERTON RESERVOIR WATER

The available Millerton Reservoir water would be reallocated through contracting with areas serviced and not serviced in the valley. All areas with existing water conveyance systems which could have accessibility to the available Millerton Reservoir water would be eligible to apply for it.

If this alternative is selected, a needed analysis along with developing a selection criteria to be applied to water user applicants for the reallocated supplies would be required.

ALTERNATIVE D – MODIFY OPERATIONS OF MILLERTON RESERVOIR FOR ALLOCATION TO FISH, WILDLIFE, AND RECREATIONAL BENEFITS

The majority of available water from Millerton Reservoir would no longer be utilized for irrigation purposes. Most water, less municipal and industrial uses, would be allocated for the enhancement of fish, wildlife, and recreational benefits in Millerton Reservoir and the San Joaquin River system. The FKU could divert floodflows for dispersal on their lands to enhance ground-water recharge and the existing canal system could be utilized for floodwater storage if some canal modifications occur. Also, available water is excess of fish and wildlife requirements would still be available for irrigation purposes. Based on preliminary investigations, it is likely

that far less than ½ of the currently available water supply would remain after supplying fish and wildfish requirements.

Selection of this alternative would require a facility operational study, along with modification of the grower's agricultural practices.

Congressional Record – Senate
Proceedings and Debates of the 102nd Congress,
First Session
Tuesday, February 26, 1991

STATEMENTS ON INTRODUCED BILLS AND JOINT RESOLUTIONS

By Mrs. KASSEBAUM:

S. 480. A bill to amend the Public Health Service Act to provide grants to States for the creation or enhancement of systems for the air transport of rural victims of medical emergencies, and for other purposes; to the Committee on Labor and Human Resources.

RURAL MEDICAL EMERGENCIES AIR TRANSPORT ACT

Mrs. KASSEBAUM.

Mr. President, I rise today to introduce legislation aimed at improving access to airborne emergency medical transportation for residents of remote rural areas.

In most urban areas of this country, persons suffering from severe medical emergency or trauma can count on being taken to an advanced center of care within a matter of minutes. For rural residents, however, such access is often limited, and sometimes nonexistent.

The hard reality is that rural hospitals often lack the money or the manpower to deliver complex medical services. In some areas, the nearest facility offering advanced tertiary medical care may be hundreds of miles away. Furthermore, rising costs and great distances have

left many rural ambulance services underfunded and overextended.

Rural distances being what they are, sometimes the only effective way to bring victims of acute medical emergencies to the care they need is by air – either by helicopter or by fixed-wing aircraft. For a wheat grower gravely injured in a farm accident or a small town storekeeper stricken by a severe heart attack, the availability of such air service can literally mean the difference between life or death.

Mr. President, the Office of Technology Assessment recently completed a comprehensive, three-part study of America's rural health care needs. In that study, the OTA reported that fully 20 percent of the U.S. population is without needed air coverage for severe medical emergencies, with the greatest gaps occurring in rural areas. Ironically, there are more than 200 air medical transport systems nationwide, but their services often fail to extend into the remote rural areas that need them most.

In my own State of Kansas, many of the sparsely populated western counties are currently served by a single air ambulance system, which is operated by a major hospital in the city of Wichita. This system, the HCA Wesley LifeWATCH Program, has been doing an outstanding job, but it has been facing significant financial pressure. Regrettably, the rising cost of both medical care and transportation has made it increasingly difficult to maintain rural air medical services on a cost-effective basis.

Until 1981, the Federal Emergency Medical Services Act provided needed assistance to States and communities for the development of emergency medical services. In that year, however, this program was discontinued and folded into the Preventive Health and Human Services Block Grant Program.

This change resulted in significant funding drops for emergency services. According to the General Accounting Office, public funding declined by as much as 34 percent in some States. There has since been a partial reversal of this trend, but most of the gains have been in urban areas. Unfortunately, the relatively high cost of providing emergency care over long distances, combined with the declining strength of rural economies, has made it hard for rural communities to keep up when public support is absent.

Mr. President, the bill I am introducing today is designed to help ease some of these problems. Developed jointly with my colleague from Kansas, Congressman PAT ROBERTS, this legislation would establish a system of

* * *

thereto or amendatory thereof, and any provision of such Acts to the contrary notwithstanding, the Secretary is authorized and directed to operate the Central Valley Project so as to:

(1) protect, restore and enhance fish, wildlife, and related habitat affected by the Project, and

(2) provide equitable treatment for fish, wildlife, and related habitat with the other primary purposes for

which the Central Valley Project is authorized to be operated.

(b) The Secretary shall provide firm water supplies of suitable quality to maintain and improve wetland habitat on National wildlife refuges in the Central Valley of California, the Gray Lodge, Los Banos, Volta, and Mendota state wildlife management areas, and the Grasslands Resource Conservation District in the Central Valley of California.

(1) Upon enactment of this Act, the quantity and delivery schedules of water for each refuge shall be in accordance with Level 2 of the "Dependable Water Supply Needs" table for that refuge as set forth in the Refuge Water Supply Report. Such water shall be delivered until the water supply provided for in paragraph (b)(2) of this section is provided.

(2) Not later than January 1, 2000, the quantity and delivery schedules of water for each refuge shall be in accordance with Level 4 of the "Dependable Water Supply Needs" table for that refuge as set forth in the Refuge Water Supply Report.

(c) In coordination with the Secretary of Commerce, State of California, appropriate Indian tribes, fisheries and conservation organizations, and the general public, the Secretary shall:

(1) develop and adopt a program to **mitigate fully** and **expeditiously** for damages suffered by anadromous fish populations on the Sacramento, San Joaquin, and Trinity rivers and their tributaries as a result of construction or operation of the Central Valley Project. Such

program shall be implemented promptly by the Secretary and shall complement and be coordinated with other existing and future efforts by the Federal Government, State of California, and appropriate Indian tribes to restore, protect or enhance anadromous fish populations.

(2) develop, adopt, and implement a program to comply with the purposes and provisions of section 5937 of the Fish and Game Code of the State of California.

(d) The Secretary of Commerce, in coordination with the State of California, appropriate Indian tribes, and other appropriate public and private entities, shall investigate and report on all effects of the Central Valley Project on anadromous fish populations and the fisheries, communities, tribes, businesses and other interests and entities that have now or in the past had significant economic, social or cultural association with those fishery resources. The Secretary of Commerce shall provide such report to the Committee on Energy and Natural Resources of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives not later than one year after the date of enactment of this Act.

(e) The Secretary shall develop a plan to fulfill the United States trust obligations with respect to the fisheries and water of the Hoopa Valley Tribe and all other affected Indian tribes or communities. The Secretary shall provide such plan to the Committee on Energy and Natural Resources and Committee on Indian Affairs of the Senate and the Committee on Interior and Insular Affairs of the House of Representatives not later than two years after the date of enactment of this Act.

SEC. 7. RESTORATION FUND AND TRUST.

(a) There is hereby established in the Treasury of the United States the "Central Valley Project Restoration Fund" (hereafter "Restoration Fund") which shall be available for deposit of donations from any source, revenues provided under subsections 4(b) and 5(a) of this Act, and funds provided under subsection (b) of this section. All such funds may be expended without further appropriation.

(b) The Secretary shall impose an operations and maintenance surcharge on

* * *

Supreme Court, U.S.
FILED
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Nos. 98-926 and 98-1018

In the Supreme Court of the United States

OCTOBER TERM, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, ET AL.,
PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

CHOWCHILLA WATER DISTRICT AND
MADERA IRRIGATION DISTRICT, PETITIONERS

v.

NATURAL RESOURCES DEFENSE COUNCIL, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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2898

QUESTIONS PRESENTED

1. Whether Section 3406(c)(1) of the Central Valley Project Improvement Act, Pub. L. No. 102-575, 106 Stat. 4721-4722, which sets out a federal program concerning the reestablishment of flows in the San Joaquin River below the Friant Unit of the Central Valley Project, facially preempts the possible application of a California statute which provides that the owner of any dams shall allow sufficient water to pass over, around, or through the dam to keep in good condition any fish that may be planted or exist below the dams.

2. Whether the Bureau of Reclamation, Department of the Interior, complied with consultation requirements of the Endangered Species Act, 16 U.S.C. 1531 *et seq.*, in connection with the renewal of certain long-term water supply contracts for water from the Friant Unit.

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In the Supreme Court of the United States

OCTOBER TERM, 1998

No. 98-926

LOWER TULE RIVER IRRIGATION DISTRICT, ET AL., PETITIONERS

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-37)[1] is reported at 146 F.3d 1118. The district court's order of April 30, 1992, is reported at 791 F. Supp. 1425. The

[1] Unless otherwise noted, references to "Pet." and "Pet. App." are to the petition and appendix in No. 98-926.

district court's orders of October 12, 1993 (Pet. App. 38-88), May 3, 1995 (Pet. App. 89-137), January 16, 1997, and April 16, 1997, are unreported.

JURISDICTION

The court of appeals entered its judgment on June 24, 1998. Petitions for rehearing were denied on September 8, 1998. Pet. App. 138. The petitions for a writ of certiorari were filed on December 7, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This litigation concerns the operations of the Friant Unit of the Central Valley Project (CVP), a federal reclamation project located in California and administered by the Bureau of Reclamation (Bureau), an agency within the Department of the Interior. The suit also involves the renewal of long-term contracts for the delivery of CVP water to water districts in the Friant Unit of the CVP (Friant Unit renewal contracts).

1. The construction of the CVP began under a presidential allocation of funds appropriated by the Emergency Relief Appropriation Act of 1935, ch. 48, 49 Stat. 115. The CVP was subsequently reauthorized by Section 2 of the Act of August 26, 1937, ch. 832, 50 Stat. 850.

This Court described the CVP's essential features and operations in *Dugan* v. *Rank*, 372 U.S. 609, 611-614 (1963); *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275, 279-287 (1958); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950). In brief, Friant Dam, situated above Gravelly Ford on the upper San Joaquin River in the southern Central Valley of California, impounds and stores the river's waters behind the dam in Millerton Lake. Since at least the early 1950s, virtually the entire flow of the river has

been diverted at the dam for storage of the water and for the delivery of water to CVP contractors via the Madera and Friant-Kern Canals, or directly from the lake, for beneficial use in the southern Central Valley area.

Prior to the Friant Unit's construction, various entities held water rights on the San Joaquin River downstream from Gravelly Ford. The United States agreed to provide substitute water to certain of those entities. See *Westlands Water Dist.* v. *Firebaugh Canal*, 10 F.3d 667, 669 (9th Cir. 1993). CVP facilities in the northern Central Valley store waters of the Sacramento, Trinity, and American Rivers. Those waters are released when needed and flow south down the Sacramento River to the Sacramento-San Joaquin Delta, east of San Francisco. The waters are then diverted from the Delta by the Tracy Pumping Plant for conveyance by the Delta-Mendota Canal to the canal's southern terminus at the Mendota Pool. That arrangement, however, leaves the stretch of the San Joaquin River between Gravelly Ford and the Mendota Pool essentially dewatered.

2. Beginning in the late 1940s, the Bureau, acting pursuant to Section 9(e) of the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1196, 43 U.S.C. 485h(e), entered into 40-year water service contracts to supply 28 entities with water from the Friant Unit. The contract with the Orange Cove Irrigation District (OCID) was the first of those contracts due to expire, on February 28, 1989. The Bureau therefore commenced contract renewal negotiations with the Friant contractors in June 1988. In November 1988, the Bureau announced completion of negotiations with OCID. The OCID contract was renewed in May 1989, after this litigation had been initiated. The Bureau

subsequently entered into 13 additional renewed long-term Friant Unit water service contracts. All 14 of those renewal contracts[2] provided for water delivery for 40-year periods in amounts essentially identical to those provided for by the previous contracts. See Pet. App. 10-11, 39.

3. The Central Valley Project Improvement Act (CVPIA), Pub. L. No. 102-575, Tit. XXXIV, 106 Stat. 4706 (Pet. App. 147-212), was signed into law on October 30, 1992, several years after this suit was filed. The CVPIA was enacted for the purpose, *inter alia*, of "achiev[ing] a reasonable balance among competing demands for use of [CVP] water, including the requirements of fish and wildlife, agricultural, municipal and industrial and power contractors." CVPIA § 3402(f), 106 Stat. 4706 (Pet. App. 162).

Section 3404(c) of the CVPIA limits the renewal term of long-term renewal contracts that had not been previously renewed to a maximum period of 25 years. 106 Stat. 4708-4709 (Pet. App. 167). In addition, Section 3404(c)(1) provides that no 25-year renewal contract may be executed until after the completion of the environmental review required by, *inter alia*, CVPIA § 3409.[3] Pending the completion of that review, the

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[2] Those contracts are referred to as "renewal contracts" because the Act of July 2, 1956, ch. 492, 70 Stat. 483, 43 U.S.C. 485h, provides for "rights of renewal" for contracts issued under Section 9(e) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(e). The original Friant contracts were Section 9(e) contracts.

[3] CVPIA § 3409 states that "the Secretary shall prepare and complete a programmatic environmental impact statement * * * analyzing the direct and indirect impacts and benefits of implementing this title, including all fish, wildlife, and habitat restoration actions and the potential renewal of all existing Central Valley Project water contracts." 106 Stat. 4730 (Pet. App. 210).

Bureau is restricted to issuing initial interim renewal contracts of no more than three years, followed by successive interim renewal contracts of no more than two years. CVPIA § 3404(c)(1), 106 Stat. 4709 (Pet. App. 167-168).

Section 3406(b) of the CVPIA directs the Bureau to operate the CVP "to meet all obligations under State and Federal law, including but not limited to the Federal Endangered Species Act, 16 U.S.C. 1531, et seq., and all decisions of the California State Water Resources Control Board establishing conditions on applicable licenses and permits for the project." 106 Stat. 4714 (Pet. App. 178). The Bureau is also directed to develop and implement "a program which makes all reasonable efforts to ensure that, by the year 2002, natural production of anadromous fish in Central Valley rivers and streams will be sustainable, on a long-term basis, at levels not less than twice the average levels attained during the period of 1967-1991." CVPIA § 3406(b)(1), 106 Stat. 4714 (Pet. App. 178). Section 3406(b)(1) further provides, however, that "this goal shall not apply to the San Joaquin River between Friant Dam and the Mendota Pool, for which a separate program is authorized under subsection 3406(c)." 106 Stat. 4714 (Pet. App. 178-179).

Under the "separate program" set out in CVPIA § 3406(c)(1), the Secretary is directed to

> develop a comprehensive plan, which is reasonable, prudent, and feasible, to address fish, wildlife, and habitat concerns on the San Joaquin River, including but not limited to the streamflow, channel, riparian habitat, and water quality improvements that would be needed to reestablish where necessary and to sustain naturally reproducing anadro-

mous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary.

106 Stat. 4721 (Pet. App. 191-192). Section 3406(c)(1) further provides that the Secretary may not make releases from Friant Dam "as a measure to implement this title" absent further congressional authorization.[4] Finally, Section 3406(c)(1) establishes a special surcharge to be paid by purchasers of Friant Unit water, which will remain in effect until the flows necessary to meet the anadromous fish needs identified in the Section 3406(c)(1) plan are provided. 106 Stat. 4722 (Pet. App. 192).

4. Congress enacted the Endangered Species Act of 1973 (ESA) to protect and conserve endangered and threatened species. 16 U.S.C. 1531(b). To accomplish that goal, Congress directed the Secretaries of Commerce and the Interior to list threatened and endangered species. See 16 U.S.C. 1533.[5] Section 7(a)(2)

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[4] The pertinent sentence states:

> During the time that the Secretary is developing the plan provided for in this subsection, and until such time as Congress has authorized the Secretary to implement such plan, with or without modifications, the Secretary shall not, as a measure to implement this title, make releases for the restoration of flows between Gravelly Ford and the Mendota Pool and shall not thereafter make such releases as a measure to implement this title without a specific Act of Congress authorizing such releases.

106 Stat. 4721 (Pet. App. 192).

[5] The Secretary of the Interior and the Secretary of Commerce share responsibility for listing species and for other ESA duties. See 16 U.S.C. 1532(15). The Secretary of the Interior implements the ESA through the Fish and Wildlife Service (FWS) with respect to the species under his jurisdiction. See 50 C.F.R.

of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2).

Regulations promulgated jointly by the two Secretaries furnish a structure for consultation. See 50 C.F.R. Pt. 402; see also 16 U.S.C. 1536(b) and (c). Under the regulations, the agency proposing the action (the action agency) determines in the first instance whether a proposed action "may affect" a listed species. 50 C.F.R. 402.14. If the action agency determines that the proposed action "may affect" a listed species, it is then to enter into formal consultation with the FWS and/or NMFS (the wildlife agencies, see note 5, *supra*), unless the action agency has concluded through preparation of a biological assessment or informal consultation[6] that the action is not likely to adversely affect the listed species. *Ibid.* Following formal consultation, the wildlife agency issues a biological opinion stating whether the proposed action is likely to jeopardize the continued existence of the listed species. 16 U.S.C.

17.11, 402.01(b). The National Marine Fisheries Service (NMFS) administers the ESA with respect to the species under the jurisdiction of the Secretary of Commerce. See 50 C.F.R. 222.23(a), 227.4.

[6] Informal consultation is an optional process that includes all discussions between the action and wildlife agencies and that is "designed to assist the Federal agency in determining whether formal consultation * * * is required." 50 C.F.R. 402.13(a). If, as a result of the informal consultation process, the action and wildlife agencies mutually conclude that the contemplated action is not likely to adversely affect listed species or critical habitat, the consultation process is terminated. 50 C.F.R. 402.13, 402.14(b).

1536(b); 50 C.F.R. 402.14. If the wildlife agency concludes that jeopardy is likely, it must suggest any reasonable and prudent alternatives that it believes would avoid jeopardy. 16 U.S.C. 1536(b)(3)(A). Section 7(d) of the ESA provides that, after the initiation of consultation, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. 1536(d).

The FWS is the wildlife agency with jurisdiction over various non-marine listed species that are present in the vicinity of the Friant Unit. The Bureau began informal consultation (see note 6, *supra*) with the FWS in 1988 when Friant Unit contract renewal negotiations were underway, and commenced formal consultation with the FWS in May 1991. The FWS issued a "no jeopardy" biological opinion on October 15, 1991. By then, the Bureau had already executed ten Friant Unit renewal contracts. Pet. App. 21, 113-114.

NMFS is the wildlife agency with jurisdiction over listed anadromous fish species occurring in the Sacramento and San Joaquin river and estuary system. In August 1989, NMFS listed the Sacramento River winter-run chinook salmon as a threatened species, which listing was subsequently changed to endangered. Pet. App. 108 n.18. The Bureau determined that the renewal of the Friant Unit contracts would not adversely affect the winter-run chinook, and it requested NMFS's concurrence in that determination. See *id.* at 19, 127-128.

On November 1, 1991, NMFS advised the Bureau that it disagreed with the Bureau's "no adverse effect" conclusion. See Pet. App. 229. NMFS further advised

(see *id.* at 229-231), however, that formal consultation regarding the impact of the renewal of the Friant Unit contracts on the winter-run chinook salmon was unnecessary because the effects of the Friant Unit operations could be addressed in the context of a broader ongoing consultation process encompassing CVP operations generally.[7] On February 14, 1992, NMFS issued a biological opinion addressing the impacts of CVP operations in 1992. See *id.* at 215-228. The biological opinion concluded "that the proposed 1992 operation of the CVP by the Bureau is likely to jeopardize the continued existence of Sacramento River winter-run chinook salmon." *Id.* at 218-219. The opinion therefore identified "reasonable and prudent alternatives" by which, in NMFS's view, the 1992 CVP operations could

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[7] NMFS's November 1, 1991, letter stated in part (Pet. App. 229-230):

> While we disagree with the Bureau's determination that renewal of [the] Friant contracts are [*sic*] not likely to affect winter-run adversely, for the reasons discussed below, we do not believe a formal consultation on Friant contract renewals is necessary.
>
> While the Friant division of the [CVP] is remote from the winter-run chinook in the Sacramento River, the interrelated export of Sacramento River water through the Delta Mendota Canal does adversely affect the winter-run of chinook salmon. This diversion contributes to the entrainment of winter-run juveniles into the delta through the delta cross channel and other channels that lead to the Federal pumps at Tracy, California. * * * However, the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureau's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts.

be modified to avoid jeopardizing the salmon. *Id.* at 219-228.

5. The Natural Resources Defense Council and others (collectively NRDC) initiated this litigation in December 1988. NRDC alleged that the Bureau intended to renew Friant Unit contracts without satisfying the requirements of Section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4332(2)(C). Affected Friant Unit renewal contractors, including petitioners, intervened as defendants. See Pet. App. 12, 39-40. The district court denied NRDC's request for a preliminary injunction barring the Bureau from renewing the contracts, and the Bureau renewed the 14 contracts at issue here. *Id.* at 12.

NRDC subsequently amended its complaint to allege violations of ESA § 7(a)(2), 16 U.S.C. 1536(a)(2). NRDC further alleged that Section 8 of the Reclamation Act of 1902, 43 U.S.C. 372, 383, which generally requires the Bureau to comply with state laws relating to the control, appropriation, use, and distribution of water used in irrigation, see *California* v. *United States*, 438 U.S. 645 (1978), makes Section 5937 of the California Fish and Game Code (West 1998) applicable to the operations of the Friant Unit.[8] Section 5937 requires owners

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[8] Section 8 states:

> [N]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from

of dams to allow sufficient water to pass to keep in good condition any fish that may be planted or exist below the dams.[9]

The Bureau and the Friant Unit renewal contractors moved to dismiss the Section 8/Section 5937 claim, asserting that Section 5937 falls outside of the ambit of Section 8 of the Reclamation Act. The district court denied that motion on April 30, 1992. *Natural Resources Defense Council* v. *Patterson*, 791 F. Supp. 1425 (E.D. Cal.). After the CVPIA was signed into law on October 30, 1992, the Bureau and the Friant contractors again moved for dismissal of the Section 8/Section 5937 claim. They asserted, *inter alia*, that CVPIA § 3406(c)(1), on its face, preempts any possible application of Section 5937 to the Friant Unit's opera-

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any interstate stream or the waters thereof: *Provided*, That the right to the use of water acquired under the provisions of this Act shall be appurtenant to the land irrigated and beneficial use shall be the basis, the measure, and the limit of the right.

Act of June 17, 1902, ch. 1093, 32 Stat. 390 (codified at 43 U.S.C. 372, 383).

[9] Section 5937 provides:

The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway.

tions. The district court rejected that argument and denied the motions to dismiss. See Pet. App. 38, 62-88.

The parties subsequently filed cross-motions for summary judgment on the NEPA and ESA issues. The district court ruled on those motions on May 31, 1995. See Pet. App. 89-137. The court found no NEPA violation. See *id.* at 92-107. The court concluded, however, that the Bureau's renewal of the relevant contracts violated the ESA because the Bureau had not adequately discharged its obligation to consult with the wildlife agencies regarding the effects of those renewals on listed species. See *id.* at 113-130.

With respect to the species falling within the jurisdiction of the FWS, the district court held that the Bureau had violated ESA § 7(a)(2), 16 U.S.C. 1536(a)(2), by renewing nine of the Friant Unit contracts before the date (October 15, 1991) when the FWS issued its "no jeopardy" biological opinion. Pet. App. 113-126.[10] The court likewise concluded (*id.* at 119-121) that the execution of those nine contracts during the pendency of consultation constituted an "irreversible or irretrievable commitment of resources" in violation of ESA § 7(d), 16 U.S.C. 1536(d). The court also held (Pet. App. 119-125) that the post-contracting completion of the

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[10] The Bureau had executed a total of ten Friant Unit renewal contracts at the time that the FWS issued its biological opinion. See p. 8, *supra*. As to one of those contracts, the Bureau had completed informal consultation with the FWS before the date of contract execution. Insofar as that contract was concerned, the district court found no violation of the ESA with respect to the species falling within the FWS's jurisdiction. Pet. App. 125-126. The court ordered that contract rescinded, however, on the ground that the Bureau had failed to pursue formal consultation with NMFS regarding the listed salmon species. *Id.* at 126-130; see p. 13, *infra*.

FWS consultation did not render the issue moot, since the court could enter effective relief by ordering rescission of the renewal contracts.

The district court also held (Pet. App. 128-130) that the Bureau had violated the ESA by failing to complete consultation with NMFS with respect to the winter-run chinook salmon. The court observed (*id.* at 128) that NMFS had refused to concur in the Bureau's determination that the contract renewals would not adversely affect the listed salmon species. In light of that non-concurrence, the court held, the Bureau could not properly rely on NMFS's contemporaneous statement that formal consultation on the contracts was unnecessary. *Id.* at 130. The court concluded that "[b]ecause all contracts at issue were executed without completed NMFS consultation, they are procedurally invalid." *Ibid.* In a subsequent order dated January 16, 1997, the district court (a) ordered rescission of all 14 renewal contracts on ESA grounds, and (b) held that the Section 8/Section 5937 claim was not ripe for decision and dismissed that claim. See *id.* at 13.

6. The Friant Unit renewal contractors appealed, challenging the district court's decision to set aside the renewal contracts on ESA grounds, as well as that court's resolution of the CVPIA facial preemption issue. NRDC appealed from the dismissal of its Section 8/Section 5937 claim and from the district court's NEPA ruling. The Bureau did not appeal. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. Pet. App. 1-37.

a. The court of appeals held (Pet. App. 18-21) that because NMFS had declined to concur in the Bureau's determination that the contract renewals were not likely to affect adversely the winter-run chinook, the Bureau had violated the ESA by renewing the con-

tracts without requesting a formal consultation. The court found that the Bureau had acted arbitrarily and capriciously in relying upon NMFS's view that formal consultation addressing the contract renewals was not required. The court explained:

> The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species, and the NMFS letter clearly disagreed with the agency's determination of no adverse impact. Under those circumstances, regardless of the NMFS position that a formal consultation was "unnecessary," the Bureau had a clear legal obligation to at least request a formal consultation. The reason that the NMFS gave for stating that a consultation was unnecessary was not supported by statute or regulation and had no rational relationship to the Bureau's independent obligations to ensure that its proposed actions were not likely adversely to affect the salmon.

Id. at 20 (citations omitted).

b. The court of appeals next found (Pet. App. 21) that "the Bureau also failed to follow its obligations under [the ESA] with respect to its consultation with the FWS" by entering into nine renewal contracts prior to the issuance of the FWS biological opinion. The court upheld the district court's determination that the Bureau's execution of the contracts before the completion of the consultation process violated ESA § 7(d), 16 U.S.C. 1536(d). Pet. App. 22-23. The court of appeals held that NRDC's challenge to the premature execution of the renewal contracts was not rendered moot by the subsequent issuance of the FWS biological opinion finding that no jeopardy would result from the contract renewals, since the district court could enter

effective relief by ordering that those renewal contracts be rescinded. *Id.* at 23-25. The court further "conclude[d] that the district court's decision to rescind the contracts was not an abuse of discretion." *Id.* at 26.

The court ended its ESA analysis by discussing the particular situations presented by certain individual renewal contracts. The court found that the special circumstances concerning the various individual contracts did not serve to distinguish any one of them from the other contracts for ESA purposes. See Pet. App. 26-30. In light of its disposition of the ESA issues, the court held that it need not resolve NRDC's NEPA claim. See *id.* at 30-31.

c. The court of appeals held that the district court had erred in finding that the NRDC's Section 8/Section 5937 claim was not ripe for adjudication. Pet. App. 31-32. The court then concluded (*id.* at 33-34) that CVPIA § 3406(c)(1) does not, on its face, preempt the possible application of Section 5937 to the operations of the Friant Unit. The court found "no clear directive in the CVPIA which preempts the application of § 5937 if the state law could be implemented in a way that is consistent with Congress' plan to develop and restore fisheries below the Friant dam in a manner that is 'reasonable, prudent, and feasible.'" *Id.* at 33-34. The court concluded its discussion by stating (*ibid*):

> The district court, as the Bureau points out, never explicitly ruled that § 5937 applied to the Friant dam. There are several other issues that the district court did not address. For example, the district court did not determine whether § 5937 is applicable to the Friant dam under state law. It is preferable to determine whether the state law applies before reaching a determination that state

law has been preempted. The district court also did not reach the issue of whether the actual application of § 5937 is inconsistent with the CVPIA. It has yet to be determined how much water release would be required under § 5937 and whether that would be consistent with the CVPIA. We remand these issues to the district court for a determination on the merits.

ARGUMENT

The decision below satisfies none of the usual criteria that this Court applies in determining whether to exercise its certiorari jurisdiction. There is no conflict among the courts of appeals, the issues presented are unlikely to recur with any frequency, and the case is still in an interlocutory posture. The petitions for a writ of certiorari should be denied.

1. Petitioners seek review (Pet. 12-20; 98-1018 Pet. 16-30) of the question whether CVPIA § 3406(c)(1) facially preempts the possible application of Section 5937 of the California Fish and Game Code (West 1998), through Section 8 of the Reclamation Act, to the operations of the Friant Unit. At least in its current posture, that question does not warrant this Court's review.

This Court "generally await[s] final judgment in the lower courts before exercising [its] certiorari jurisdiction." *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of the petition for writ of certiorari); see also, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam) (denying certiorari "because the Court of Appeals remanded the case," making it "not yet ripe for review by this Court"). At present, the question whether Friant Unit operations are subject to Section 5937 of

the California Fish and Game Code is not ripe for resolution by this Court. The court of appeals rejected petitioners' contention that CVPIA § 3406(c) (1) on its face precludes the application of Section 5937 to the Friant Unit. Pet. App. 33-34. In remanding the case to the district court, however, the court of appeals left open the questions (a) whether Section 5937 applies to the Friant dam as a matter of California law, and (b) if so, whether application of that Section to the Friant Unit is inconsistent with the overall CVPIA scheme and therefore preempted. *Id.* at 34. If either of those issues is resolved favorably to petitioners, the question whether CVPIA § 3406(c)(1) on its face preempts the application of Section 5937 to the Friant Unit will be of no practical significance. Review by this Court would accordingly be premature.

2. Petitioners contend (see Pet. 20-22, 27-29) that the courts below erred in ordering rescission of nine of the Friant Unit renewal contracts on the ground that the contracts were executed before the FWS issued its biological opinion. Although we disagree with that aspect of the court of appeals' decision, we do not believe that the issue warrants review by this Court.

a. This Court has repeatedly emphasized that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982). Rather, "the bases for injunctive relief are irreparable injury and inadequacy of legal remedies. In each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or

withholding of the requested relief." *Amoco Prod. Co.* v. *Village of Gambell*, 480 U.S. 531, 542 (1987).

Well before the district court rendered its decision in this case, the FWS issued a biological opinion stating that renewal of the pertinent contracts would not jeopardize the continued existence of species falling within that agency's jurisdiction. Neither of the courts below cast doubt upon the adequacy of that biological opinion. Absent any showing that renewal of the contracts would result in harm to listed species, the rescission remedy ordered by the district court and affirmed by the court of appeals was inappropriate. Compare *Village of Gambell*, 480 U.S. at 544 (vacating grant of injunctive relief and noting that the court of appeals "erroneously focused on the statutory procedure rather than on the underlying substantive policy the process was designed to effect").

We do not believe, however, that this aspect of the court of appeals' decision warrants further review. Although the district court ordered rescission of the contracts previously executed between petitioners and the Bureau, it did not enjoin the parties from executing new contracts for Friant Unit water. The Department of the Interior informs us that the Friant contractors whose 40-year renewal contracts were rescinded in this litigation are currently receiving water under interim contracts issued pursuant to CVPIA § 3404(c)(1), as are the additional 14 Friant contractors whose contracts were not renewed prior to the passage of the CVPIA. Nor, contrary to petitioners' contention (see Pet. 28), did the court of appeals announce a per se rule mandating the rescission of a contract or lease whenever the relevant federal agency fails to comply in a timely fashion with applicable procedural requirements. The court held only that under the circumstances of this

case, "the district court's decision to rescind the contracts was not an abuse of discretion." Pet. App. 26. Particularly in light of the limited practical impact of the rescission remedy in the circumstances of this case, that fact-specific holding does not warrant this Court's review.[11]

b. Petitioners also contend (Pet. 20-23) that the issuance of the FWS biological opinion rendered NRDC's ESA claim moot. In our view, the mootness inquiry is essentially derivative of the remedial issue discussed above. If rescission of the pertinent contracts was inappropriate, then completion of the consultation process did effectively render moot any controversy as to the propriety of the pre-completion execution of those contracts. If (as the courts below held) rescission remained an appropriate remedy even after the FWS biological opinion was issued, then issuance of that opinion could not be thought to have rendered the question moot. In either event, petitioners' mootness argument adds nothing of substance to their contention that the district court improperly ordered the contracts rescinded.[12]

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[11] NRDC asserted, as a separate ESA claim, that the biological opinion issued by the FWS in 1991 was inadequate. The courts below found it unnecessary to address that issue in light of their determination that rescission of the contracts was an appropriate remedy for the untimeliness of the FWS consultation. See Pet. App. 25 n.8, 132. As we explain above, we disagree with that determination. We note, however, that if this Court were to grant the petition for a writ of certiorari and reverse that holding, the result would not be to terminate the controversy regarding the FWS consultation process. Rather, such a decision would likely lead to further litigation concerning the adequacy of the 1991 biological opinion.

[12] Contrary to petitioners' contention (Pet. 21-22), the court of appeals' decision in this case does not conflict with the decisions in

3. Petitioners contend (Pet. 23-24) that the courts below erred in ordering rescission of all 14 of the Friant Unit renewal contracts on the additional ground that the Bureau breached its ESA obligations with respect to the winter-run chinook salmon. We agree that the Ninth Circuit's analysis on that point was also mistaken, but we do not believe that the error warrants this Court's review.

Section 7(a)(2) of the ESA requires that "[e]ach Federal agency shall, in consultation with and with the assistance of the Secretary [of Commerce or the Interior], insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. 1536(a)(2). That provision does not, however, speak to the *manner* in which ESA consultation must be conducted. In particular, Section 7(a)(2) does not suggest that the action and wildlife agencies are required to engage in a

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Southern Utah Wilderness Alliance v. *Smith*, 110 F.3d 724, 727-729 (10th Cir. 1997), and *Sierra Club* v. *Glickman*, 156 F.3d 606, 618-620 (5th Cir. 1998). In each of those cases, the only relief sought for the alleged procedural violation was an order directing the relevant federal agency to engage in consultation with the FWS. Under those circumstances, the Fifth and Tenth Circuits held that completion of the consultation processes rendered the controversies moot, since after consultation was completed the courts lacked the ability to award meaningful relief. See *Sierra Club*, 156 F.3d at 619 (issue was moot since "there is no relief that can be obtained from this court"); *Southern Utah*, 110 F.3d at 728 (plaintiff "does not explain how an injunction ordering another round of consultation would provide any meaningful relief"). Those decisions have no bearing on the instant case, where the court of appeals' resolution of the mootness issue was expressly based on its determination that an additional remedy (rescission of the contracts) remained available.

separate consultation process for each discrete agency "action." Rather, insofar as Section 7(a)(2) may be said to impose a "procedural" obligation on federal action agencies, that obligation is simply to engage in consultation at such time and in such manner as is necessary to "insure" that the agency's activities are not likely to jeopardize the continued existence of any listed species. Cf. *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, 435 U.S. 519, 524 (1978) ("this Court has for more than four decades emphasized that the formulation of procedures was basically to be left within the discretion of the agencies to which Congress had confided the responsibility for substantive judgments").

In the instant case, NMFS concluded that consultation specifically directed to the Friant Unit contracts was unnecessary because any indirect adverse effects of Friant Unit contract renewals on the listed salmon could adequately be addressed in a larger ongoing consultation on the CVP as a whole. Pet. App. 230; see note 7, *supra*. In our view, that determination was well within NMFS's considerable range of discretion. In light of that determination by the wildlife agency having jurisdiction over the listed salmon species, the Bureau did not behave arbitrarily in declining to make further efforts to initiate formal consultation with respect to the contracts themselves.[13]

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[13] For the foregoing reasons, we believe that NMFS and the Bureau could permissibly agree to consider the effects of Friant Unit operations on the listed salmon within the context of the overall CVP operations, rather than in a separate consultation directed at the Friant contracts themselves. Petitioners suggest (Pet. 9, 20) that a biological opinion issued by NMFS on February 14, 1992 (Pet. App. 215-228) adequately addressed the effects on the salmon of the pertinent Friant renewal contracts. That opinion

We do not believe, however, that the court of appeals' contrary ruling warrants review by this Court. The court of appeals did not purport to issue any broad pronouncement concerning the nature of the procedural obligations imposed by the ESA. Nor does the court's holding conflict with any decision issued by this Court or by another court of appeals. Further review of this fact-specific question is not warranted.

4. Petitioners contend (Pet. 25-27) that the court of appeals erred in applying ESA § 7(d) to the Bureau's consultation with FWS. Section 7(d) provides that, after the initiation of consultation between the action and wildlife agencies, the action agency "shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures." 16 U.S.C. 1536(d). Petitioners assert that the restrictions of Section 7(d) apply only after the initiation of consultation (Pet. 25-26); that, under the applicable regulations, "consultation begins when an agency requests a list of species that may be present in the proposed action area" (Pet. 26); and that "consultation in this case, for purposes of Section 7(d), began on April 13, 1988, not May 22, 1991, as the Ninth Circuit concluded" (Pet. 27).

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stated, however, that "NMFS and the Bureau agreed that this initial consultation would include only CVP operations in 1992, but consultation would continue on the long-term impacts, and a new opinion would be issued for future operations." *Id.* at 217. We are informed by the Department of the Interior that on February 12, 1993, NMFS issued a biological opinion that addressed the Bureau's long-term operation of the CVP. Neither of the courts below addressed that biological opinion.

The court of appeals, however, did not hold that the "consultation" commenced for ESA § 7(d) purposes on May 22, 1991—it merely observed (correctly) that "[f]ormal consultation was requested on May 22, 1991." Pet. App. 21. In any event, petitioners do not explain how an *earlier* "initiation of consultation" date could work to their advantage here. Indeed, petitioners maintain (Pet. 26) that Section 7(d) "imposes restrictions on agency action that do not exist before the initiation of consultation."[14] If, as petitioners maintain, the Bureau's ability to act became more restricted once consultation with FWS had been initiated, then an earlier "initiation of consultation" date could not possibly change any aspect of this litigation to petitioners' advantage. Accordingly, the ESA § 7(d) question does not warrant review by this Court.[15]

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[14] The initial Friant Unit renewal contract was executed in May 1989, after consultation had been initiated by the Bureau's request to FWS for a species list. See Pet. App. 26-29, 113. Hence, this case does not concern what effects, if any, ESA § 7(d) may have with respect to agency commitments of resources undertaken prior to the initiation of consultation.

[15] Petitioners in No. 98-1018 raise a variety of claims unique to the circumstances of petitioners Chowchilla Water District and Madera Water District. See 98-1018 Pet. 30-38. Those claims raise no issues of general importance warranting this Court's review.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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Supreme Court of the United States

October Term, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, et al.,

Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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REPLY TO BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

I.

INTRODUCTION

The "Brief for the Federal Respondents in Opposition" ("Federal Brief"), contains nothing that should dissuade this Court from reviewing the three issues of national significance raised by this case. These issues are: (1) the exercise by Congress in the Central Valley Project Improvement Act ("CVPIA") of its authority to preclude the application of state law by clear statutory directive; (2) the scope of the consultation obligation of the Endangered Species Act ("ESA"); and (3) whether the implementation of that consultation requirement and a resultant no jeopardy finding moot a procedural violation of the consultation requirements, rendering remedial action unnecessary.

Despite agreeing with Petitioners that the Ninth Circuit *incorrectly decided* these issues, Federal respondents nevertheless suggest that the Supreme Court should not grant certiorari in this case. However, the Federal Brief offers no convincing basis for the denial of review. In fact, since Federal respondents agree with Petitioners' substantive arguments, the Federal Brief actually supports Petitioners' argument that certiorari should be granted.

II.

FEDERAL RESPONDENTS AGREE THAT THE NINTH CIRCUIT ERRED IN CONCLUDING THE BUREAU OF RECLAMATION BREACHED ITS ENDANGERED SPECIES ACT OBLIGATIONS

Federal respondents clearly articulate their disagreement with the Ninth Circuit's decision that the Bureau of Reclamation ("Bureau") breached its ESA obligations:

> "In the instant case, NMFS concluded that consultation specifically directed to the Friant Unit contracts was unnecessary because any indirect adverse effects of Friant Unit contract renewals on the listed salmon could adequately be addressed in a larger ongoing consultation on the CVP as a whole. Pet. App. 230; see note 7, *supra*. In our review, that determination was well within NMFS's considerable range of discretion. In light of that determination by the wildlife agency having jurisdiction over the listed salmon species, the Bureau did not behave arbitrarily in declining to make further efforts to initiate formal consultation with respect to the contracts themselves. (Footnote omitted.)" (Federal Brief at 21.)

This is precisely the issue raised by the Petition for Writ of Certiorari. Federal respondents, however, go on to conclude that this Court need not review the Ninth Circuit's decision because the Ninth Circuit "did not purport to issue any broad pronouncement concerning the nature of the procedural obligations imposed by the ESA." (Federal Brief at 22.) Although Federal respondents no doubt have their own reasons for seeking to construe the Ninth Circuit's decision narrowly, the Ninth Circuit's decision, itself, includes no language expressly narrowing its application. To the contrary, the Ninth Circuit's opinion states that in relying on the opinion of the National Marine Fisheries Service ("NMFS") "the Bureau did not meet its independent responsibilities under the ESA. The Bureau had an affirmative duty to ensure that its actions did not jeopardize endangered species. . . . " (Appendix at 20.)

Petitioners are concerned that there is no indication from the Ninth Circuit's opinion that it applies only to the facts of the instant case. Furthermore, it is hard to conceive that the Ninth Circuit's opinion would not be construed by some as precedential authority for future

agency actions under the ESA. Thus, Federal respondents' brief offers no basis for this Court to not grant certiorari, and its concurrence with Petitioners' position is further reason for this Court to make such a grant and use this opportunity to clarify the confusion created by the Ninth Circuit decision.

III.

FEDERAL RESPONDENTS SUPPORT PETITIONERS' POSITION THAT THE NINTH CIRCUIT ERRED IN RULING THAT RESCISSION WAS THE SOLE AVAILABLE REMEDY

Federal respondents also disagree with the Ninth Circuit's affirmance of the district court's decision rescinding nine of the Friant Unit renewal contracts because the contracts were executed before the FWS issued its biological opinion. Federal respondents base their position in part on *Weinberger v. Romero-Barcello*, 456 U.S. 305, 313 (1982), the same case cited by Petitioners, for the proposition that "[t]he grant of jurisdiction to ensure compliance with a statute hardly suggests an absolute duty to do so under any and all circumstances, and a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law." (Federal Brief at 17.) Federal respondents continue:

> "Well before the district court rendered its decision in this case, the FWS issued a biological opinion stating that renewal of the pertinent contracts would not jeopardize the continued existence of species falling within that agency's jurisdiction. Neither of the courts below cast doubt upon the adequacy of that biological opinion. Absent any showing that renewal of the contracts would result in harm to listed species, *the rescission remedy ordered by the district*

> *court and affirmed by the court of appeals was inappropriate.*" (Federal Brief at 18; emphasis added.)

In short, Federal respondents again concur with the legal position expressed in the Petition for Writ of Certiorari. However, Federal respondents conclude that even though the Ninth Circuit's decision is wrong, this Court should not review it. The rationale seems to be that if water supply contracts for hundreds of thousands of acres of the nation's most productive farmland are rescinded Petitioners can simply sign new contracts. This reasoning ignores the fact that these new contracts may contain substantially different provisions than the rescinded contracts. As the Ninth Circuit noted in its opinion, there is no guarantee that Petitioners would receive the same amount of water under the same terms as they did under the previous contracts:

> "Even if the original contracts guaranteed a right to available water in the renewal contracts, the Bureau had discretion to alter key terms in the contracts, and might have been able to reduce the amount of water available for sale if necessary to comply with the ESA." (Appendix at 18.)

Since any new contracts entered into by Petitioners may be substantially modified, Federal respondents' attempt to discourage this Court from reviewing the Ninth Circuit opinion is unavailing: while more onerous contract terms may be of no consequence to the United States, they could be highly significant to the thousands of farmers who rely upon the Central Valley Project for their water supply. Indeed, section 3404(c) of the CVPIA limits the length of new contracts.

Federal respondents also contend that the issue of whether the implementation of the ESA's consultation requirement and a resultant "no jeopardy" finding moot a procedural violation of the consultation requirement, is

derivative of the rescission issue and thus does not warrant review. (Federal Brief at 19.) This assertion is hard to understand since Federal respondents *agree* with Petitioners that rescission is inappropriate. (Federal Brief at 18.) Federal respondents state that if rescission was inappropriate, then completion of the consultation process effectively rendered moot any controversy about the propriety of executing these contracts prior to the completion of consultation. (*Id.* at 19.) The Ninth Circuit's decision, however, is to the contrary: "Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA has not occurred." (Appendix at 24.) Frankly, Petitioners find Federal respondents' position that this Court not review a published appellate decision they believe to be wrong as a matter of law to be inexplicable.

Furthermore, Federal respondents' claim – understandably relegated to a footnote – that the Ninth Circuit's ruling on mootness presents no conflict with the decisions of the Fifth and Tenth Circuits, is wrong. As discussed at length in the Petition For Writ of Certiorari, both *Southern Utah Wilderness Alliance v. Smith*, 110 F. 3d 724 (10th Cir. 1997) and *Sierra Club v. Glickman*, 156 F. 3d 606 (5th Cir. 1998) directly hold that subsequent procedural compliance with ESA requirements *moots* a claim of procedural violation. (Pet. 20-22.) The Federal Brief attempts to distinguish these cases by arguing that the Ninth Circuit's decision rested on the Court's belief that rescission of the contracts was an available remedy and that the only relief sought in those cases was for the relevant federal agencies to engage in consultation. (Federal Brief at 19-20.) The *relief* sought in the cases is irrelevant to the mootness issue. The issue before both the Fifth and Tenth Circuits was identical to the issue faced by the Ninth Circuit in this case; *viz*, whether subsequent

procedural compliance with ESA requirement moots a claim of a procedural violation of the Act. In *Southern Utah Wilderness* the Tenth Circuit used a different standard in determining mootness, namely whether ordering further consultation would provide any meaningful relief. (110 F.3d at 728.) Similarly, the Fifth Circuit in *Glickman*, upon determining that there had been subsequent compliance with the ESA's provisions, found the issue of procedural violation moot. (156 F. 3d at 620.) In the present case, however, the Ninth Circuit *ignored* the issue of compliance and found no mootness because the *process* of consultation in and of itself was essential. (Appendix at 24.)

In short, the three circuits are in direct conflict on this highly important issue. The Fifth and Tenth circuits use a factual test to determine if there has been compliance with the ESA's procedural requirements. The Ninth Circuit ignores whether compliance has actually been achieved and bases its decision solely on process. Contrary to Federal respondents' assertion, the Ninth Circuit's decision was not based on the existence of rescission as a remedy. Rather, it conflicts with the decisions of the Fifth and Tenth Circuits because it focuses solely on whether the process of consultation was followed, not the substantive result. In these circumstances, review by this Court is appropriate to resolve this split among the circuits.

IV.

THE ISSUE OF FACIAL PREEMPTION IS RIPE FOR REVIEW

Federal respondents never contend that Petitioners are incorrect in concluding that CVPIA section 3406(c)(1) on its face precludes the application of California Fish

and Game Code section 5937 to the Friant Unit.[1] Indeed, Federal respondents *joined with the Petitioners* at the district court level in asserting that CVPIA section 3406(c)(1), on its face, preempts any possible application of section 5937 to the Friant Unit's operations. (Federal Brief at 11-12.) Despite the fact that Federal respondents agree with Petitioners on this legal issue, however, they urge the Court not to review the Ninth Circuit's decision. Apparently Federal respondents hope that, notwithstanding the Ninth Circuit's incorrect resolution of the facial preemption issue, the district court will resolve the section 5937 question on the merits in a manner that limits the effect of the Ninth Circuit's mistake. This argument provides no basis for denying review of the facial preemption question.

The issue presented is whether section 3406(c)(1) of the CVPIA *facially preempts* the application of section 5937, a purely legal question. The cases cited by Federal respondents involve situations where additional factual issues were still to be resolved by the district courts. In

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[1] California Fish and Game Code section 5937 provides:

> "The owner of any dam shall allow sufficient water at all times to pass through a fishway, or in the absence of a fishway, allow sufficient water to pass over, around or through the dam, to keep in good condition any fish that may be planted or exist below the dam. During the minimum flow of water in any river or stream, permission may be granted by the department to the owner of any dam to allow sufficient water to pass through a culvert, waste gate, or over or around the dam, to keep in good condition any fish that may be planted or exist below the dam, when, in the judgment of the department, it is impracticable or detrimental to the owner to pass the water through the fishway."

Brotherhood of Locomotive Firemen v. Bangor Aroostook Railroad Co., 389 U.S. 327, 328 (1967) (per curiam), for example, the Court held that the district court had improperly ruled without trying certain issues of fact. Thus, it was appropriate for this Court to withhold review until the factual issues in the case had been fully developed at the district court level. Similarly, in *Virginia Military Institute v. United States*, 508 U.S. 946 (1993), this Court withheld review of the constitutionality of the admission practices of an all male military school since the appellate court had remanded the case to allow the school to develop a plan that would comply with the constitutional requirement of equal protection. Again, review was declined in order to allow the lower court to more fully develop the facts of the case.

On the other hand, this Court has repeatedly held that cases presenting purely legal questions *are* ripe for review. (*Thomas v. Union Carbide Agricultural Products Co.*, 437 U.S. 568, 581 (1985); *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).) Even cases that are only *predominantly* legal, where further factual development will not be beneficial, are routinely considered ripe. (*Pacific Gas & Electric v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190, 201 (1983).) The issue of facial preemption presented by the Petition herein is a purely legal question. Since the Ninth Circuit deemed the issue ripe for review, and since there will be no further factual development on remand relative to the facial preemption issue, this Court should grant certiorari to review the facial preemption question.

V.

THE NINTH CIRCUIT ERRED IN CONCLUDING THE BUREAU OF RECLAMATION'S CONSULTATION WITH THE FISH AND WILDLIFE SERVICE WAS UNTIMELY

This Court should also review the Ninth Circuit's conclusion that the Bureau's consultation with FWS was untimely. Federal respondents misunderstand Petitioners' argument regarding the execution of the Friant contracts prior to the completion of the FWS's biological opinion. The Ninth Circuit misconstrued section 7(d) of the ESA as an *authorization* of agency action that otherwise would be prohibited.[2] To the contrary, however, section 7(d) is a limitation on certain types of agency action that may otherwise proceed pending consultation. Under the ESA, agency action may proceed forward even *after* consultation has been initiated unless the action involves an irreversible or irretrievable commitment of resources that forecloses the implementation of any reasonable and prudent measures that might otherwise be adopted. So long as an agency action does not involve such a commitment of resources, it is *irrelevant* whether consultation has begun. The Ninth Circuit's interpretation of section 7(d) turns the section on its head and provides an additional basis for review by this Court.

---

[2] Section 7(d) of the ESA (16 U.S.C. § 1536(d)) provides:

> "After initiation of consultation required under subsection (a)(2) of this section, the Federal agency and the permit or license applicant shall not make any irreversible or irretrievable commitment of resources with respect to the agency action which has the effect of foreclosing the formulation or implementation of any reasonable and prudent alternative measures which would not violate subsection (a)(2) of this section."

VI.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Certiorari and review, *inter alia*, the issues that Petitioners and the Federal respondents agree were incorrectly resolved by the Ninth Circuit Court of Appeals.

Dated: February 19, 1999

Respectfully submitted,

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Nos. 98-926 and 98-1018

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, *et al.*,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

CHOWCHILLA WATER DISTRICT and
MADERA IRRIGATION DISTRICT,
Petitioners,

v.

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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1998

QUESTIONS PRESENTED

1. Whether section 3406(c)(1) of the Central Valley Project Improvement Act, a federal environmental law that prohibits certain Friant Dam flow releases "as a measure to implement *this title*," facially preempts California Fish and Game Code § 5937, a pre-existing state law that requires flow releases to protect downstream fisheries.

2. Whether the Bureau of Reclamation was excused from a statutory requirement that the Bureau either consult formally with the National Marine Fisheries Service on certain water contract renewals or obtain the Service's concurrence that the renewals were unlikely to affect a protected species adversely, where the Service *refused* to give the Bureau its concurrence but stated that consultation was unnecessary at that time due to a separate ongoing consultation, which itself did not consider the renewals.

3. Whether Respondents' action to rescind certain water supply contracts, which the Bureau of Reclamation renewed before completing mandatory formal consultation with the Fish and Wildlife Service, was "mooted" by the Bureau's *ex post facto* consultation, even though the contracts continued to injure the Respondents until rescinded.

STATEMENT PURSUANT TO RULE 29.6

Respondents have no parent or nonwholly owned subsidiary companies.

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NATURAL RESOURCES DEFENSE COUNCIL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT

Respondents are conservation organizations and recreational and commercial fishing groups whose members experience "economic and recreational damage * * * occasioned by the drying up of the San Joaquin River below the Friant Dam."[1] In 1989, Respondents sued the Bureau

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[1] *See Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425, 1429 (E.D. Cal. 1992). Respondents are Natural Re-

of Reclamation ("Bureau") and the Secretary of the Interior (collectively, "the Government") to challenge several long-term water supply renewal contracts about to be executed by the Bureau, and petitioner irrigation districts and water user authority ("Petitioners") intervened. When the district court invalidated the contracts as violative of the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq.*, and implementing regulations, Petitioners (but not the Government) appealed. The Court of Appeals unanimously rejected Petitioners' arguments (Pet. App. 1, 36),[2] and Petitioners sought this Court's review. The Government joins in some of Petitioners' merits arguments—an unsurprising position given that the Government was a defendant below, and lost—but agrees with Respondents that review by this Court is not warranted.[3]

Petitioners' Statement (Pet. 3-12) obscures or ignores several significant facts:

First, Petitioners' argument that the Bureau need not consult with the National Marine Fisheries Service (NMFS) about the Friant renewal contracts rests on the assertion that the Bureau did formally consult with

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sources Defense Council; Trout Unlimited of California; Bay Institute of San Francisco; California Natural Resources Federation; California Sportfishing Protection Alliance; California Trout; Friends of the River; Northern California Guides Association; Pacific Coast Federation of Fishermen's Associations; San Joaquin Raptor Rescue Center; Sierra Club; Stanislaus Audubon Society, Inc.; United Anglers of California; California Striped Bass Association; and National Audubon Society.

[2] Unless otherwise noted, references to "Pet. App.," "Pet.," "Reply," or "Petitioners" are to the Petition Appendix, Petition, Reply, and Petitioners in No. 98-926. The Petition in No. 98-1018 is addressed at note 15, *infra*.

[3] The Government does not join Petitioners' merits argument on preemption (Gov't Opp. 16-17) and disagrees with Petitioners on mootness (Gov't Opp. 19 & n.12).

NMFS on overall Central Valley Project ("CVP") operations in 1992. Pet. 8, 9, 24. However, the Bureau's 1992 consultation with NMFS *specifically excluded any consideration* of either the Friant renewal contracts or the direct impacts of Friant Dam operations and diversions. Pet. App. 216.

Second, Petitioners assert that the NMFS's 1992 "reasonable and prudent alternative" for CVP operations called for no changes in Friant operations or renewal contracts. Pet. 9. But the NMFS's 1992 biological opinion did not even consider whether to recommend changes to Friant operations or renewal contracts as part of an alternative to prevent jeopardy to the protected chinook salmon. Pet. App. 216, 219. Instead, NMFS developed its "reasonable and prudent alternative" through a consultation process that excluded consideration of the contracts.

Third, Petitioners' Statement ignores that, after the district court invalidated the renewal contracts, Petitioners and the Bureau executed interim replacement contracts under the CVPIA that are more protective of Respondents' environmental and other interests. New long-term replacement contracts will likely also be more protective of Respondents' interests, because the long-term replacement contracts must comply with Central Valley Project Improvement Act (CVPIA) requirements, *see, e.g.*, CVPIA §§ 3404(c), 3405 (Pet. App. 167-177), and be negotiated in light of extensive environmental reviews.

Fourth, contrary to Petitioners' implication (Pet. 4; Reply 4; No. 98-1018 Pet. 12), this litigation has never prevented Petitioners from receiving water from the Friant Unit. Gov't Opp. 18. Petitioners' assertion that the contract rescissions have significantly impacted Central Valley agriculture is wholly unsupported by the record.[4]

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[4] In addition, Petitioners' implication (Pet. 11) that Respondents never challenged the Fish and Wildlife Service ("FWS") biological

ARGUMENT

This case satisfies none of the usual criteria for granting a writ of certiorari. The questions presented are unlikely to arise often, there is no conflict among the circuits, and the decision below was correct.

1. *The Preemption Question.* Petitioners first ask this Court to construe a federal statutory provision that applies to just one dam in the country. The extreme narrowness of that question militates against granting review. Review is especially inappropriate because the courts below have not yet resolved whether the allegedly preempted state statute even *applies* to that dam under state law. Moreover, the decision below was a plainly correct application of this Court's precedent to plain statutory language, and neither the Federal government nor the State of California seeks review.

The allegedly preemptive provision of federal law is found in the Central Valley Project Improvement Act, Pub. L. No. 102-575, Title XXXIV, 106 Stat. 4706, which generally directed the Secretary of the Interior to "develop and implement a program" to sustain production of anadromous fish (such as the chinook salmon) in Central Valley rivers at twice the species' average 1967-1991 level. CVPIA § 3406(b)(1) (Pet. App. 178). However, because Congress was unsure what program should be implemented for the particular stretch of the San Joaquin River below Friant Dam, Congress deferred that question, and instead instructed the Secretary of the

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opinion is false. As explained by the Government (Gov't Opp. 19 n.11), Respondents *have* challenged the validity of the FWS biological opinion, under both the Endangered Species Act and the Administrative Procedure Act. Respondents' substantive challenge to that FWS opinion was dismissed without prejudice *only* because Respondents' other victories "offered complete relief." Pet. App. 25 n.8.

Interior to develop a plan to improve San Joaquin streamflow, riparian habitat, and water quality. CVPIA § 3406 (c)(1) (Pet. App. 191). Congress emphasized, however, that it was not yet directing the Secretary to implement any new flow-release program for that stretch, for Congress restricted the Secretary's authority to release water from the Friant Dam "*as a measure to implement this title.*" *Id.* (Pet. App. 192) (emphasis added).

In *California v. United States*, 438 U.S. 645 (1978), this Court held that, under Reclamation Act § 8, California "may impose *any* condition on the 'control, appropriation, use or distribution of water' through a federal reclamation project that is not inconsistent with clear congressional directives." *Id.* at 672 (emphasis added).[5] While CVPIA § 3406(c)(1) required the Secretary to develop a San Joaquin River restoration plan, nothing in that section's language even hinted that Congress intended to suspend the Secretary's existing legal responsibilities, particularly the Secretary's existing duties to comply with state water law. The modifying clause "as a measure to implement this title" plainly limited the surrounding text —i.e., it limited the Secretary's authority to release water from the Friant Dam to implement the CVPIA—and would have been mere surplusage if, as Petitioners con-

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[5] Section 8 of the Reclamation Act, 43 U.S.C. § 383, provides that "[n]othing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws." Petitioners concede that "purposeful and continued deference to State water law by Congress" permeates "the federal-state relationship concerning water usage." Pet. 13 (internal quote marks omitted).

tend, Congress had intended flatly to prohibit *all* release of water from Friant Dam, no matter what the statutory basis.[6]

The allegedly preempted provision of California law, Fish and Game Code § 5937, requires dam owners to "allow sufficient water" to be released from a dam "to keep in good condition any fish" downstream. Section 5937 is not a "measure to implement" the CVPIA. Indeed, section 5937 predated the CVPIA. On its face, the CVPIA does not preempt section 5937 or any other state law. If section 5937 applied to the Friant Dam before the CVPIA's enactment—a question that the court of appeals remanded to the district court to resolve in the first instance[7]—then section 5937 continued to apply

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[6] Disregarding the "duty to give effect, if possible, to every clause and word of a statute," *United States v. Menasche*, 348 U.S. 528, 538-39 (1955) (internal quote marks omitted), Petitioners never suggest a meaning for the phrase "as a measure to implement this title." Petitioners suggest only that the key phrase should be construed in light of the CVPIA's "broad" purposes. Pet. 17-18. However, there is no facial conflict between the CVPIA's purposes —e.g., "to protect, restore, and enhance fish, wildlife, and associated habitats in the Central Valley," *see* CVPIA § 3402(a) (Pet. App. 162)—and California Fish and Game Code § 5937, which requires dam owners to allow sufficient water to flow over, around, or through a dam or fishway "to keep in good condition any fish that may be planted or exist below the dam."

[7] As the Government notes (Gov't Opp. 16-17), the courts below did not resolve whether § 5937 applied to the Friant Dam as a matter of state law, or if it did, whether that section would in practice interfere with CVPIA § 3406(c)(1) (Pet. App. 34). These unresolved issues counsel against review. In reply, Petitioners (Reply 8) cite several cases—*Abbott Lab. v. Gardner*, 387 U.S. 136 (1967); *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, (1985); and *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Devel. Comm'n ("PG&E")*, 461 U.S. 190 (1983)—in which this Court decided to review issues that had a "direct and immediate" impact, 387 U.S. at 152, or had "plagued" industry and "seriously hampered" implementation of federal law, 473 U.S. at

after the CVPIA's enactment.[8]

2. *The NMFS Consultation Question.* Petitioners contend (Pet. 23-24) that the courts below should have excused the Bureau from its ESA consultation obligations, despite NMFS's disagreement with the Bureau over whether the Friant renewal contracts were likely to affect chinook salmon adversely. Pet. App. 229. However, Petitioners have not suggested any split among the circuits, have not shown that the issue presented is likely to arise often, and have offered no other good reason for review.

As for the merits, the Bureau squarely violated the ESA and implementing regulations when it renewed the Friant contracts without completing formal NMFS consultation. Section 7(a)(2) of the ESA requires "[e]ach Federal agency" to consult with the NMFS or FWS to "insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species." 16 U.S.C. § 1536(a)(2). The implementing regulations require each federal agency to engage in "formal consultation" if "a determination is made" that "any action may affect listed species." 50 C.F.R. § 402.14(a). Formal consultation is excused *only* if "the Federal agency determines, *with the written concurrence of [NMFS or FWS]*, that the proposed action is not likely

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581, or required prompt resolution to prevent a "palpable and considerable hardship, 461 U.S. at 201-02. The present case is clearly different, as the Court here cannot know whether § 5937 will ever be applied adversely to Petitioners. *Cf. PG&E*, 461 U.S. at 203.

[8] Unable to offer any alternative explanation for the phrase "as a measure to implement this title," Petitioners argue that "[t]he legislative history of the CVPIA * * * strongly supports an interpretation that Congress intended the Act to preempt state law relating to the release of water from Friant Dam." Pet. 19. Petitioners' legislative history argument was carefully considered—and rejected—by the district court. Pet. App. 75 n.17, 77-82.

to adversely affect any listed species" (or in one other circumstance not at issue). 50 C.F.R. § 402.14(b) (emphasis added).[9] Here, of course, NMFS did not give the Bureau its "written concurrence," but rather *disagreed* with the Bureau's view that the Friant contracts were unlikely to impact winter-run chinook salmon adversely. Formal consultation was required.

Thus, the court of appeals was correct that NMFS's statement to the Bureau that consultation on the contract renewals was "not * * * necessary" at that time (Pet. App. 229, 231) did not excuse the Bureau's consultation obligation. NMFS premised its statement on the fact that the Bureau and NMFS were separately consulting on proposed overall CVP operations. Pet. App. 230. But the Bureau's consultation on the proposed overall CVP operations specifically excluded consideration of the renewal contracts (the agency action at issue here) or any direct consideration of Friant operations. Pet. App. 216. The Bureau's general CVP consultation therefore could not have satisfied the Bureau's obligation to consult formally on the Friant contracts.

Moreover, NMFS ultimately concluded that the proposed overall CVP operations were "*likely to jeopardize* the continued existence" of the winter-run chinook salmon. Pet. App. 218-19 (emphasis added). While NMFS offered the Bureau one alternative that could "be implemented by the Bureau to avoid jeopardy" (Pet. App. 219), neither NMFS nor the Bureau considered whether releases from Friant Dam (or any other changes at Friant

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[9] Similarly, the legislative history of ESA § 7 shows Congress' intent that "[i]f the Federal action agency or the Secretary determines that a proposed action may affect a listed species or its habitat, immediate consultation shall be undertaken." H.R. Rep. No. 1625, 95th Cong., 2d Sess. 20 (Sept. 25, 1978), *reprinted in* 1978 U.S.C.C.A.N. 9470

or in the renewal contracts) should be pursued to avoid jeopardy. Pet. App. 216, 219. Of course, by the time NMFS issued its 1992 Biological Opinion, the Bureau already had renewed numerous Friant water supply contracts. The Bureau's renewal of those contracts prior to completing any formal consultation with NMFS on CVP operations violated ESA § 7(d), which specifically prohibits federal agencies from "mak[ing] *any* irreversible or irretrievable commitment of resources" that "has the effect of foreclosing the formulation or implementation of *any* reasonable and prudent alternative" until consultations are completed. 16 U.S.C. § 1536(d) (emphasis added).

Petitioners' argument rests on the false premise that "the Secretary of Commerce refuse[d] to consult" with the Bureau (Pet. i), and upon Petitioners' contention, based on that false premise, that the Bureau would have to "sue its sister agency" to persuade NMFS to consult (Pet. 23). But the Bureau never asked NMFS to engage in formal consultations on the Friant contracts. Thus, despite Petitioners' oft-repeated assertions (Pet. i, 10, 23), NMFS never "refused" to consult. Rather, the Bureau asked NMFS to concur that the Friant renewal contracts "will not affect" the chinook salmon, and NMFS *declined to concur* in that view. Pet. App. 229. NMFS also offered its advice that formal consultation was "not * * * necessary," but did not refuse to consult. In any event, as the Government itself agrees (Gov't Opp. 22), the unique factual dispute as to whether the NMFS "refused" to consult does not merit this Court's review.[10]

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[10] Petitioners also discuss an ESA § 7(d) issue (Pet. 25-27) that is not among the Petitioner's "Questions Presented." *See* Pet. i; *see also* Reply 1. Under this Court's Rule 14.1(a), "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." While the court of appeals' application of ESA § 7(d) may be "*related* to * * * and perhaps *complementary* to" the "Questions" as to which a writ of certiorari is sought, the

3. *The "Mootness" Question.* Petitioners contend that because consultation with the FWS on the Friant renewal contracts eventually occurred—albeit *after* the contracts were a *fait accompli*—Respondents' claim that the Bureau thereby violated the ESA is moot. Even if Petitioners were right, that issue would not merit review because the courts below had a separate and adequate basis for the relief ordered, and thus resolution of the FWS issue cannot affect the relief ordered. But Petitioners are not right: The court of appeals' decision as to FWS consultation was consistent with the decisions of other circuits and correctly applied the decisions of this Court.

First, the court of appeals (Pet. App. 21a, 23) affirmed the district court's invalidation of the Friant renewal contracts on two distinct grounds: (1) the Bureau's failure to consult in advance with the FWS and (2) the Bureau's failure *ever* to consult with NMFS. Because the mootness question arises, if at all, only as to Respondents' FWS consultation claim (Pet. i), the contracts would remain rescinded even if that claim somehow were moot (which it is not).[11]

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challenged application of ESA § 7(d) is "not 'fairly included'" in those "Questions." *Yee v. City of Escondido*, 503 U.S. 519, 537 (1992) (emphasis in original). Even if it were—and even if, as the Petitioners contend, the court of appeals mistook the date on which ESA § 7(d) began to apply (something Respondents do not concede)—such a factual error would not warrant this Court's scrutiny. *See* Supreme Court Rule 10. And as the Government notes (Gov't Opp. 23), Petitioners cannot possibly benefit from their position that ESA § 7(d) should have applied for a *longer* period.

[11] The Petitioner's NMFS consultation issue is whether formal consultation was required *at all* on the renewal contracts, not whether that consultation belatedly occurred. Petitioners do not argue that the disagreement over NMFS consultation is moot, nor could they, since formal consultation with NMFS on the Friant contracts never took place. The Bureau's 1992 consultation with NMFS concerning overall CVP operations specifically excluded any consideration of the Friant renewal contracts.

Second, the decision below is consistent with those of other circuits. In *Southern Utah Wilderness Alliance v. Smith*, 110 F.3d 724, 727 (10th Cir. 1997) ("*SUWA*"), ESA consultation was "the only relief sought by" the plaintiff. Thus, the *SUWA* plaintiff's sole prayer for relief was satisfied once the *SUWA* defendants completed ESA consultation; there was "no point in ordering an action that has already taken place." *Id.* at 728. Here, by contrast, rescission relief was sought and attained only by order of the district court, and *SUWA* certainly does not preclude such relief, since the *SUWA* court made clear that its holding was "*not* * * * that a violation of section 7(a)(2) could always be cured by subsequent consultation." 110 F.3d at 729 (emphasis added).

In *Sierra Club v. Glickman*, 156 F.3d 606, 611 (5th Cir. 1998), the district court ordered the United States Department of Agriculture ("USDA") to consult with the FWS concerning a particular program. While USDA's appeal was pending, USDA completed ESA consultations and fully satisfied the district court's order. *Id.* The court of appeals then held that USDA's *appeal* was moot, because "the USDA clearly fulfilled whatever obligations it had as a result of the district court's order" and could obtain no relief from the appellate court. *Id.* at 619.

The present controversy simply is not like *SUWA* and *Glickman*. Respondents seek a remedy—rescission of the unlawful contracts—that was not performed until the court ordered it and that benefitted them by replacing all fourteen renewal contracts with more environmentally protective contracts under the CVPIA. The Government is thus correct that *SUWA* and *Glickman* "have no bearing on the instant case." Gov't Opp. 19 n.12.[12]

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[12] The "mootness" question in this case is wholy dissimilar from that in *Friends of the Earth v. Laidlaw Environmental Services*

Third, the decisions below correctly applied established mootness principles. Rescission of the unlawful contracts redressed Respondents' injuries by, *inter alia*, requiring the Bureau to renegotiate the contracts in light of environmental reviews and CVPIA requirements. Congress presumably believed that requiring federal agencies to complete ESA consultations before irrevocably committing resources would beneficially influence agency decisionmaking. *See* ESA § 7(d), 16 U.S.C. § 1536(d). Petitioners in fact concede that "the new contracts may contain substantially different provisions than the rescinded contracts" and that "there is no guarantee that Petitioners would receive the same amount of water under the same terms as they did under the previous contracts." Reply 4. As Petitioners' concession suggsets, neither the courts below nor any of the parties to this case have ever suggested that contract renegotiation would lead to contracts unchanged from the original.[13]

(TOC) Inc., 149 F.3d 303 (4th Cir. 1998), *petition for cert. granted*, No. 98-822 (Mar. 1, 1999). The narrow mootness issue posed by *Laidlaw* is whether, and under what circumstances, a private person who sues to enforce the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, has a cognizable interest in civil penalties payable to the Treasury, if the defendant halts its illegal pollution after the complaint is filed. 149 F.3d at 306-07. Here, by contrast, Petitioners do not presently dispute that Respondents suffer a continuing injury from the diversion of San Joaquin River water. Contract rescission redresses that injury sufficiently to satisfy the case-or-controversy requirement.

13 The Petition contends that the court of appeals "erred in ruling that rescission * * * was the sole available remedy." Pet. 27-29. This issue, like the ESA § 7(d) issue, *see* note 10, *supra*, is not among the Petition's "Questions Presented." Pet. i; *see also* Reply 1. While the court of appeals' review of the district court's remedy may be "*related* to * * * and perhaps *complementary* to" the "Questions" as to which a writ of certiorari is sought, it is "not 'fairly included' " in the "Questions Presented." *Yee*, 503 U.S. at 537.

In any event, Petitioners' argument that the court of appeals required rescission "*automatically in all cases*" (Pet. 28; emphasis

Of course, Article III does not require Respondents to show that rescission will *necessarily* benefit them: A "person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting the normal standards for redressability and immediacy." [14] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992). Indeed, "one living adjacent to the site for proposed construction of a federally licensed dam has standing to challenge the licensing agency's failure to prepare an environmental impact statement, even though he cannot establish with any certainty that the statement will cause the license to be withheld or altered, and even though the dam will not be completed for many years."

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in original) ignores that court's holding. As the Government observes, the court of appeals did not "announce a per se rule." Gov't Opp. 18. Rather, it stated that the district court "had *discretion* to preserve the contracts if the procedural flaw could have been rectified in another way," but that "there is no reason to compel that result here." Pet. App. 25-26. The court of appeals therefore held that "the district court's decision to rescind the contracts was not an abuse of discretion." Pet. App. 26. Petitioners offer no reason for this Court to revisit a fact-specific, abuse-of-discretion inquiry.

[14] There appears to be no present dispute that Respondents have both a procedural right under the ESA, *see, e.g., Bennett v. Spear*, 117 S. Ct. 1154, 1162-63 (1997); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 180-81 (1978), and a concrete and cognizable interest in the terms of the Friant contracts, *see, e.g., Spear*, 117 S. Ct. at 1162-63 (holding that the ESA citizen suit provision expanded standing "to the full extent permitted under Article III"); *Natural Resources Defense Council v. Patterson*, 791 F. Supp. 1425 (E.D. Cal. 1992) (noting Respondents' allegations that their members "earn their living from the San Joaquin River and its environs and engage in recreational activites on the river" and have suffered "economic and recreational damage * * * occasioned by the drying up of the San Joaquin River below the Friant Dam resulting from the Bureau's delivery of water pursuant to the original contracts"). Moreover, Respondents' interest in the outcome of the case need not fit within any particular statutory "zone of interest." *See Spear*, 117 S. Ct. at 1162-63.

Id. The courts below correctly determined (Pet. App. 24-25, 123) that invalidation of the renewal contracts would benefit Respondents sufficiently to satisfy Article III.[15]

CONCLUSION

For the reasons stated above, the petitions for writs of certiorari should be denied.

Respectfully submitted,

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[15] Petitioners in the separate Petition No. 98-1018 also raise *sui generis* contract issues and a question concerning the date on which a particular contract became effective. No. 98-1018 Pet. 2. Those questions turn on facts concededly "unique" (No. 98-1018 Pet. 13) to those Petitioners and with no general significance; they were properly addressed by the court of appeals (Pet. App. 26-30), and do not merit the attention of this Court. Moreover, as the court of appeals noted (Pet. App. 29), a prior case already decided that Madera and Chowchilla are not exempt from the ESA. *Madera Irrigation Dist. v. Hancock*, 985 F.2d 1397, 1405-06 (9th Cir.), *cert. denied*, 510 U.S. 813 (1993).

Supreme Court, U.S.
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No. 98-926

In The

Supreme Court of the United States

October Term, 1998

LOWER TULE RIVER IRRIGATION DISTRICT, et al.,

Petitioners,

vs.

NATURAL RESOURCES DEFENSE COUNCIL, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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I.

INTRODUCTION

The three issues presented in this case all meet this Court's criteria for review. The Endangered Species Act ("ESA") issues relating to consultation and mootness are of national significance and will arise again, and the mootness issue involves a conflict between four circuit court decisions issued in the past two years. The facial preemption issue is also of national significance. All three issues were wrongly decided. Furthermore, Respondents' Brief in Opposition ("Respondents' Brief"), response to this Court's order of March 3, 1999, offers no convincing reason why this Court should not review the issues presented by this case. Indeed, in a brief in support of Respondents' application for attorney's fees ("Attorney's Fees Brief," App. at 1-8) filed before the Ninth Circuit, they strenuously argue that all three issues have national significance. Specifically, Respondents contend that the law of the ESA relating to the scope of the consultation obligation and whether subsequent compliance moots a procedural violation of the consultation requirement is significantly impacted as a result of the Ninth Circuit's decision in this case. Respondents also stated that the decision on the facial preemption issue reaffirms a national precedent.

Despite agreeing with Petitioners that the Ninth Circuit's decision on these issues is of national significance and that they will arise in other cases, Respondents nevertheless argue that the Supreme Court should not grant certiorari in this case. However, Respondents' arguments in their Attorney's Fees Brief leave no doubt that all these issues are appropriate for review and highlight the reasons why this Court should grant the Petition for Writ of Certiorari.

II.

THERE IS A CONFLICT AMONG THE CIRCUITS ON MOOTNESS AND SUBSEQUENT COMPLIANCE WITH ESA REQUIREMENTS

Respondents argued to the Ninth Circuit that its mootness decision is of broad application and very significant:

> "This Court's decision aids interpretation and implementation of ESA in a number of ways. . . . As explained by Professor Dan Tarlock a nationwide authority on both western water law and the ESA, "[f]or the *first time* a court has held that the failure to respect mandated processes cannot be corrected by post hoc actions because post hoc actions preclude possible mitigation options." (Citation omitted.) This Court's affirmation of ESA procedure as essential to overall compliance with the statute *has application to a wide variety of government projects.*" (App. at 5-6; emphasis added.)

Professor Tarlock's statement emphasizes the uniqueness of the Ninth Circuit's decision and the conflict between the circuits on this issue. Respondents' attempt to argue to the contrary before this Court is unavailing and in direct contradiction of their Attorney's Fees Brief.[1]

Respondents argue that since the relief sought in the instant case was rescission, the Ninth Circuit's decision is consistent with the Tenth Circuit's decision in *Southern Utah Wilderness Alliance v. Smith,* 110 F.3d 724 (10th Cir. 1997) ("SUWA") and the Fifth Circuit's decision in *Sierra Club v. Glickman,* 156 F.3d 606 (5th Cir. 1998). This is

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[1] Respondents' argument that the mootness issue is not appropriate for review because there is a separate basis for the Ninth Circuit's decision is specious. Obviously, Petitioners contend that the Ninth Circuit also incorrectly decided the NMFS consultation and that both aspects of the decision are wrong.

incorrect. The issue in all three cases is whether subsequent procedural compliance with ESA requirements moots a claim of procedural violation. The *relief* sought in the cases is irrelevant. If subsequent procedural compliance moots a procedural violation there is no basis for relief, including rescission. Thus, Respondents' argument is merely an attempt to obscure the existing conflict between the Fifth and Tenth Circuits, which have directly held that subsequent procedural compliance with ESA requirements moots the claim of procedural violation, and the Ninth Circuit, which held the opposite in the instant case.

The national significance and frequency of subsequent compliance with environmental statutes is readily apparent in that a similar mootness issue is already before this Court in *Friends of the Earth v. Laidlaw Environmental Services (TOC) Inc.*, 149 F.3d 303 (4th Cir. 1998), (petition for cert. granted, No. 98-822, Mar. 1, 1999), which involves subsequent *substantive* compliance with provisions of the Clean Water Act, 33 U.S.C. § 1251, et seq., Respondents try and distinguish the mootness issue in *Laidlaw* on the grounds that in the instant case there is a continuing injury. This is irrelevant because the *Laidlaw* court did not base its decision on the lack of continuing injury: " . . . we assume without deciding that Plaintiffs had standing to initiate this action and have proven a continuous injury in fact. (Citation omitted.)" (*Id.* at 306.) Instead, the *Laidlaw* decision was based on the court's conclusion that the only remedy available would not redress plaintiff's injury (" . . . we conclude that this action is moot because the only remedy currently available to Plaintiffs . . . would not redress any injury Plaintiffs have suffered". (*Id.* at 306-307.)) This is exactly the rationale used by the Fifth Circuit in *Glickman* ("Thus, there is no relief that can be obtained from this court." (156 F.3d at 619.)) and by the Tenth Circuit in *SUWA* ("Indeed SUWA does not explain how injunction ordering another round of consultation would provide any meaningful relief." (110 F.3d at 728.)) Although *Laidlaw*

involves a substantive violation, this Court now has before it a situation where the Fourth, Fifth and Tenth Circuits have held, in the past two years, that subsequent compliance with the provisions of an environmental statute moots a claim of violation. As noted by Professor Tarlock, the Ninth Circuit stands alone in holding that subsequent procedural compliance is meaningless in curing a procedural violation.

III.

THE ISSUE OF FACIAL PREEMPTION IS RIPE FOR REVIEW

Respondents oppose this Court's review of the conflict between the provisions of the Central Valley Project Improvement Act ("CVPIA") Pub. L. No. 102-575, 106 Stat. 4706, §§ 3401, et seq., and California Fish and Game Code Section 5937 on three grounds. First, Respondents argue that the issue is extremely narrow. (Respondents' Brief at 4.) However, Respondents' Attorney's Fees Brief, argues the opposite: "This Court's holding that the federal reclamation laws do not preempt Section 5937 of the State's Fish and Game Code also *reaffirms an important national precedent* that federal water and power projects may not ignore state laws protecting fish and wildlife." (App. at 5; emphasis added.)

Second, Respondents argue that this Court should not review the preemption issue because the lower court has not determined whether Section 5937 even applies to Friant Dam. Essentially, Respondents are arguing that the issue is not yet ripe. However, in their Attorney's Fees Brief Respondents stated that: "This Court's decision, rejecting any facial preemption argument, thus effects a clear *'material alteration' of the legal relationship between the parties,. . . .* " (App. at 7, emphasis added.) Respondents' opposition to this Court's review is wildly inconsistent with its own position before the Ninth Circuit.

Respondents go even further, setting forth the specific impacts that the Ninth Circuit's decision *has already had*:

> "This Court's decision on the preemption issue *has also had direct practical consequences.* (Citations omitted.) Before this Court's decision, the State Water Resources Control Board had announced that it would await a ruling on the preemption issue before considering the Bureau's request for licensing of Friant Dam. Candee Dec. Ex. 28. That Board also deferred certain public trust petitions, *which it now can act upon.* Candee Dec. ¶ 28. Moreover, in the wake of the District Court's earlier finding (now affirmed by this Court) that state laws such as Section 5937 could be applied to the Friant Dam, the State Board recently issued a draft EIR on implementation of the state's Bay-Delta water quality standards *which includes an alternative calling for substantial releases from Friant Dam for downstream fishery and water quality purposes, solely pursuant to state law.*" (App. at 7; emphasis added.)

Respondents' argument to this Court is even more stunning because the above-quoted conclusions are based on the declaration of Hamilton Candee, Respondents' counsel of record in this case! Mr. Candee's declaration provides strong support for Petitioners' position that this Court should review the facial preemption issue at this time.

Remarkably, despite their statement that there have already been "direct practical consequences" of the Ninth Circuit's decision, and the supporting declaration of their counsel of record, Respondents then argue that the Ninth Circuit's decision does not meet this Court's standard of reviewability because this case has not had a "direct and immediate impact". (*Abbott Laboratories v. Gardner*, 387 U.S. 136, 152 (1967).) Respondents state: "The present case is clearly different [from *Abbott*] as the Court here cannot know whether Section 5937 will ever be applied

adversely to petitioners." (Respondents' Brief at 7, fn. 7.) It is hard to comprehend how "direct practical consequences" do not constitute "a direct and immediate impact." Furthermore, Respondents specifically state that Section 5937 is currently being adversely applied to Petitioners in that releases of water from Friant Dam are being considered to meet State Bay-Delta quality standards.

Finally, Respondents contend that the decision below correctly applied plain statutory language.[2] In the Petition, the conflict between the statutory language and congressional directives regarding Friant Dam was discussed at length. (Petition at 14-20.) Respondents' argument simply ignores that Congress' intent in the CVPIA was to develop a comprehensive plan that would address environmental concerns on the San Joaquin River. Respondents also ignore the plain language in the CVPIA in which Congress specifically exempted Friant Dam from responsibility for implementing that comprehensive plan.

What is truly remarkable about Respondents' argument is the notion that, although Congress expressly prohibited releases from Friant Dam in Section 3406(c) of the CVPIA, it *by implication* repealed a half century of congressional policy precluding releases from Friant Dam in order to allow the State to regulate releases under Fish and Game Code Section 5937. In fact, this Court has twice opined that it was Congress' intent to prohibit releases from Friant Dam. In *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950), this Court recognized that the Friant Unit was authorized by Congress with the understanding that it would impound virtually the entire flow of the San Joaquin River at Friant Dam and that a dry riverbed

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[2] At page 6, footnote 6 of Respondents' Brief, Respondents incorrectly state that Petitioners never suggest a meaning for the phrase "as a measure to implement this title." In actuality, Petitioners discuss the meaning of this phrase at page 17 of the Petition.

would exist below the dam. (*Id.* at 729-730.) Ten years after Friant operations began, this Court noted that almost three-fourths of the flow of the San Joaquin River was impaired, but declined to increase downstream flows on the grounds that to do so would force the abandonment of the project authorized by Congress and would cause the government to be "stopped in its tracks." (*Dugan v. Rank*, 372 U.S. 609, 620-621 (1963).) Contrary to this Court's decision in *California v. United States*, 438 U.S. 645 (1978), the Ninth Circuit ignored the clear congressional directives of the past half century, including those in the CVPIA, and found no facial preemption of the application of State law to Friant Dam.

In *California v. United States, supra*, this Court carefully articulated the rule governing the federal-state relationship relating to water usage. The nature of this relationship is a frequently occurring issue in water cases. The Ninth Circuit's decision threatens to disrupt the relationship defined by this Court in *California v. United States* and this Court should review this issue.

IV.

THE NINTH CIRCUIT ERRED IN RULING THAT THE BUREAU VIOLATED ITS ESA OBLIGATIONS BY ACCEPTING NMFS'S REFUSAL TO CONSULT

Respondents' Brief argues that the issue of whether the Bureau violated its ESA obligations by accepting NMFS's refusal to consult will not arise frequently. (Respondents' Brief at 7.) However, Respondents told the Ninth Circuit this issue would arise again:

> *"An additional important aspect of this Court's decision is its agreement with the district court that a federal agency has its own independent responsibility to comply with ESA procedure. See* Dunning Decl. at ¶ 9; (citation omitted). This holding will help prevent *agencies' future attempts* to justify non-compliance with the ESA by arguing that their

> actions had been somehow 'approved' by the wildlife agencies." (App. at 7; emphasis added.)

Thus, according to Respondents, this issue meets the criteria for review by this Court.

Respondents contend that NMFS did not refuse to consult with the Bureau. However, on November 1, 1991 NMFS responded to the Bureau's request for consultation: " . . . we do not believe a formal consultation on Friant contract renewals is necessary." (Petition App. at 229.) Similarly, Respondents' assertions (Respondents' Brief at 3) that Friant operations and renewal contracts were not considered in the overall consultation on Central Valley Project ("CVP") operations are simply incorrect:

> "Given that the issue of delta exports is being addressed in ongoing consultations and that the Bureau is conditioning renewed Friant contracts so they may be modified to compensate for changes in delta exports if needed, *we see no need to consult on Friant contract renewals at this time.* "However we may request initiation of the consultation process [in the future if certain criteria are met]. . . . " (Petition App. at 231; emphasis added.)

Respondents have *never* been able to explain how this was not a refusal to consult by NMFS and how the Bureau could have pursued further consultation with an agency that refused to do so. Rather than address this central problem, Respondents distort the facts regarding NMFS's consultation on overall CVP operations, which *did* occur.

Respondents state that the Bureau's 1992 consultation with NMFS "specifically excluded any consideration of either the Friant renewal contracts or the *direct* impacts of Friant Dam and operations and diversions." (Respondents' Brief at 3; emphasis added.) This is a disingenuous semantic exercise by Respondents. According to NMFS, Friant Dam *has no direct impact*: "Operations of the Friant Unit *do not directly effect winter-run chinook salmon*, and the indirect impacts of Friant operations are addressed in the discussion of the Delta Division Operations." (Petition App. at

216; emphasis added.) Thus, there were no direct impacts to consider, and the indirect impacts were being considered in the Delta Division consultation.

Respondents also state that NMFS's 1992 jeopardy biological opinion did not even consider whether to recommend changes to Friant operations or renewal contracts as part of an alternative to prevent jeopardy to the winter-run chinook salmon. (Respondents' Brief at 3, 8.) Once again, Respondents seek to mislead the Court. According to NMFS, Friant operations and contract renewal were indirectly affecting the Sacramento River winter-run salmon by requiring the export pumping of Sacramento River water from the Delta. NMFS *did* consider and consult with the Bureau on Delta export pumping in its consultation on overall CVP operations. Indeed, the comprehensive biological opinion issued by NMFS on the subject of overall CVP operations included an RPA that imposed restrictions on CVP operations, exports and take of juvenile salmon. Thus, the Bureau *did* consult with NMFS on the only identified effect of Friant contract renewal that NMFS believed was impacting the salmon and the biological opinion issued by NMFS dealt specifically with that effect.

Respondents also omit NMFS's rationale for not recommending changes to Friant operations or renewal contracts:

> " . . . the issue of delta exports is being addressed in our ongoing consultation on the CVP (see the Bureau's request for consultation on the CVP, dated April 11, 1991) and we believe this will allow us to address the adverse impacts from activities interrelated to the renewal of the Friant contracts." (Petition App. at 230.)

As for the renewal contracts, NMFS stated:

> "We have reviewed the language the Bureau is incorporating in the renewed contracts as paragraph 14 'Compliance with reclamation Laws – Modification of Contract' and agree that to the extent it protects the Bureau from making any

> irreversible or irretrievable commitment of resources that would foreclose the Bureau's ability to develop or implement any alternatives to reduce the adverse impacts that result from delta exports, it satisfies the provisions of the Endangered Species Act on this point." (Petition App. at 231.)

NMFS's refusal to consult was a reasonable exercise of its discretion and the Bureau did not act arbitrarily in fulfilling its ESA obligations. This Court should grant certiorari to clarify the confusion created by the Ninth Circuit's decision.

V.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Dated: April 23, 1999

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATURAL RESOURCES DEFENSE COUNCIL, *et al.*, Plaintiffs/Appellees/ Cross-Appellants, v. ROGER PATTERSON, as Regional Director of the UNITED STATES BUREAU OF RECLAMATION, *et al.*, Defendants/Cross-Appellees and LOWER TULE RIVER IRRIGATION DISTRICT, *et al.* Defendants-Intervenors/ Appellants/Cross-Appellees.	Nos. 97-16030 97-16041 97-16042 97-16043 97-16044 97-16045 97-16155 97-16173 DC# CIV-S-88-16588-LKK

On Appeal from the United States District Court for the Eastern District of California

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PLAINTIFFS/APPELLEES/CROSS-APPELLANTS NATURAL RESOURCES DEFENSE COUNCIL, *ET AL.*'S BRIEF IN SUPPORT OF APPLICATION FOR ATTORNEYS' FEES, COSTS AND EXPENSES ON APPEAL

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to listed species before executing any new long-term contracts with its agricultural customers for the delivery of San Joaquin River water. *Id.* at 1126-28. In addition, this Court ruled in Plaintiffs' favor that the Government's obligation to comply with California Fish & Game Code § 5937 ("Section 5937") was a ripe issue, *id.* at 1131, and that Section 5937 was not preempted on its face by the federal reclamation laws. *Id.* at 1131-32.

Plaintiffs' victory in this Court will have a lasting effect on the preservation of endangered species in the Central Valley and San Joaquin River watershed and on the future restoration of that environment. It will also have a significant impact on future government contract renewals, requiring the government to conduct endangered species consultation and environmental review before making irrevocable commitments of the public's resources. This Court's holding that the federal reclamation laws do not preempt Section 5937 of the State's Fish

and Game Code also reaffirms an important national precedent that federal water and power projects may not ignore state laws protecting fish and wildlife.

Plaintiffs request an award under ESA of $334,357 for attorneys' fees for the work performed on appeal by Plaintiffs' counsel with respect to ESA claims. Plaintiffs also request an award under EAJA of $200,916 for work performed on appeal with

* * *

species of fish and wildlife."[19]

1. This Decision Will Aid Interpretation and Implementation of ESA.

This Court's decision aids interpretation and implementation of ESA in a number of ways. First, it establishes that compliance with ESA's procedural requirements (in this case the requirement that federal agencies obey its consultation requirements before committing public resources) is essential to preserve the substantive goals of the Act, protecting species from extinction. As this Court explained:

> Procedural violations of the ESA are not necessarily mooted by a finding by the FWS that a substantive violation of the ESA had not occurred. The process, which was not observed here, itself offers valuable protections against the *risk* of a substantive violation and ensures that environmental concerns will be properly

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[19] S. Rep. No. 307, 93rd Cong., 1st Sess., reprinted in 1973 U.S.C.C.A.N. 2989, 2989-30.

factored into the decision-making process as intended by Congress. 146 F.3d at 1128-1129)

This key holding forecloses future attempts by federal agencies to rationalize, on a post-hoc basis, that their prior commitment of public resources had no adverse effects on endangered species. Nor may agencies use contractual devices such as Article 14(c) "to skirt the procedural requirements" of ESA. 146 F.3d at 1128. As explained by Professor Dan Tarlock a nationwide authority on both western water law and the ESA, "[f]or the first time a court has held that the failure to respect mandated processes cannot be corrected by post hoc actions because post hoc actions preclude possible mitigation options." Tarlock Decl., ¶ 8. This Court's affirmation of ESA procedure as essential to overall compliance with the statute has application to a wide variety of government projects.

This Court's decision will also ensure future ESA compliance through its holding that the proper remedy for an ESA procedural violation is rescission of the illegally executed contract. As Professor Tarlock notes, "the contract rescission remedy is a significant remedial holding because it makes it clear that procedurally defective administrative action will not be allowed to stand." Tarlock Decl., ¶ 9. This Court's remedial holding will help ensure that agency officials and their private contractors comply with ESA procedure *before* entering into agreements that might otherwise harm endangered species.[20]

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[20] An additional important aspect of this Court's decision is its agreement with the district court that a federal agency has its own independent responsibility to comply with ESA procedure.

* * *

consistently declined to evaluate what compliance with Section 5937 might mean at Friant Dam because it has maintained that it is exempt from that statute. This Court's decision, rejecting any facial preemption argument, thus effects a clear "material alteration" of the legal relationship between the parties, thereby making the Plaintiffs "prevailing parties."

This Court's decision on the preemption issue has also had direct practical consequences. *See* Declarations of Brian Gray, Harrison Dunning, Jan Stevens and Dan Tarlock. Before this Court's decision, the State Water Resources Control Board had announced that it would await a ruling on the preemption issue before considering the Bureau's request for licensing of Friant Dam. Candee Dec. Ex. 28. That Board also deferred certain public trust petitions, which it now can act upon. Candee Dec. ¶ 28. Moreover, in the wake of the District Court's earlier finding (now affirmed by this Court) that state laws such as Section 5937 could be applied to the Friant Dam, the State Board recently issued a draft EIR on implementation of the state's Bay-Delta water quality standards which includes an alternative calling for substantial releases from Friant Dam for downstream fishery and water quality purposes, solely pursuant to state law. *Id.*

See Dunning Decl. at ¶ 9; *see* 146 F.3d at 1127 ("Bureau had affirmative duty to ensure that its actions did not jeopardize endangered species. . . . "). This holding will help prevent agencies' future attempts to justify non-compliance with the ESA by arguing that their actions had been somehow "approved" by the wildlife agencies.

This Court's rejection of the defendants' preemption arguments makes clear that these various state law based proceedings will no longer be constrained by the Government's

* * *